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CAPACITY TO ACQUIRE A DOMICILE

ALTHOUGH the English law of domicile in its modern form may be dated conservatively from the 1860s, the richest decade in the history of this basic concept,[1] its development since that time has been negligible. With rare exceptions, decisions of the past eighty years have conformed to the pattern of mid-Victorian England, despite the almost complete change in the sociological context in which the main principles were laid down. It is hardly an overstatement to say that nothing has been changed and little has been added to the law of domicile since the time when Mr. Bell turned his back upon his native Jamaica, Colonel Udny, harried by creditors, passed a necessary but not unpleasant sojourn with his mistress at Boulogne, and Madame Raffenel, afflicted simultaneously with home-sickness and sea-sickness, was forced to end her days miserably (one assumes) under the shadow of her deceased husband's French domicile.[2] In providing the curtain scene for each of these Victorian melodramas the English courts played a part entirely in keeping with the spirit of their age. Some of the rules which were then affirmed are still substantially sound and reasonable, such as the law on the acquisition and loss of a domicile of choice, though even here a justifiable moderation of the element of intention was made as early as 1892.[3] But in two respects the nineteenth century law of domicile is inadequate : in the gaps which (fortunately) it

[1] Outstanding cases of the period are *Shaw* v. *Gould* (1865) L.R. 3 H.L. 55; *Bell* v. *Kennedy* (1868) L.R. 1 H.L. (Sc. & D.) 307 and *Udny* v. *Udny* (1869) L.R. 1 H.L. (Sc. & D.) 441.

[2] *In the Goods of Raffenel* (1863) 3 Sw. & Tr. 49; 32 L.J.P. & M. 203.

[3] By Chitty J. in *Re Craignish* [1892] 3 Ch. 180, who preferred an intention to reside indefinitely to that of residing permanently as a test of the acquisition of an English domicile.

still contains, and in the rules affecting the domicile of dependent persons, particularly of married women both during and after the death of their husbands. It is proposed to consider one important instance of the first type of inadequacy.

No reported English case known to the writer has yet decided this fundamental and elementary question: what law governs capacity to acquire or change a domicile? A few cases [4] have answered in the negative the different but related question of whether a married woman may acquire a domicile separate from that of her husband, but in all of them the decision has turned on the conceptual nature of unity of domicile of husband and wife in the *lex fori*, not on the choice of law question of what law governs capacity. In no other branch of the conflict of laws, with the possible exception of procedure, has rigid conceptualism so obscured the question of choice of law.

The English courts have, with complete justification, established the principle of defining domicile for the purposes of an English rule of conflict of laws according to the concepts of English law.[5] They have, furthermore, adhered with considerable rigidity to the principle that the domicile of a dependent person, whether a wife [6] or a child under the age of majority,[7] is the same as, and changes with, the domicile of the person on whom he or she is dependent. However, decisions on the general questions of acquisition, change and loss of domicile have all been concerned with persons of full age and capacity by English law, and presumably by any other relevant law, so that the question of choice of law to govern capacity has never been a direct issue before the court. The body of law thus created, and particularly the reasoning by which it was built up, have served to draw a veil over the incidental or preliminary question of what law governs capacity to acquire a domicile. The numerous English decisions which have upheld the law of the domicile as governing capacity to perform various acts, such as to marry,[8] to make a marriage settlement [9] or a will of movables,[10] have reasoned from domicile to capacity. In reversing this process resort may be had to the analogy of those and other decisions on the choice of law to govern capacity to perform acts of various kinds.

[4] *Lord Advocate* v. *Jaffrey* [1921] 1 A.C. 146; *Att.-Gen. for Alberta* v. *Cook*, [1926] A.C. 444.
[5] *Re Martin* [1900] P. 211; *Re Annesley* [1926] Ch. 692.
[6] *Lord Advocate* v. *Jaffrey* (above); *Att.-Gen. for Alberta* v. *Cook* (above).
[7] *Somerville* v. *Somerville* (1801) 5 Ves. 750.
[8] *E.g.*, *Brook* v. *Brook* (1861) 9 H.L.C. 193; *Sottomayor* v. *de Barros* (2) (1879) L.R. 5 P.D. 94.
[9] *Cooper* v. *Cooper* (1888) 13 App.Cas. 88.
[10] *Thornton* v. *Curling* (1824) 8 Sim. 310.

From this dearth of judicial authority one turns in vain to most of the English authors on private international law who, while dealing with those cases in which capacity for acts other than the acquisition of domicile itself depends on domicile, are silent on the problem under discussion.[11] It is possible, however, that an unintended deduction of some assistance may be drawn from various statements, both judicial and juristic, on the law to determine status and the extent of recognition of status and its incidents. A representative passage which has stood the test of seventy years may be taken from Dicey's *Conflict of Laws*.[12] In his comment to what is now Rule 113 the author wrote, 'The existence, at any rate, of a status imposed by the law of a person's domicile ought in general to be recognised in other countries, though the courts of such countries may exercise their discretion in giving operation to the results or effects of such status'. Although the creation and continuance of status itself depends on the law of the domicile the generality of Dicey's principle may be sufficiently wide to comprehend capacity to acquire or change domicile as one of the incidents of status. Of more direct relevance is the comment of the learned editor of Dicey's *Conflict of Laws*[13] upon Rule 9, dealing with the domicile of dependent persons, a Rule which 'applies to all infants and married women, whatever their domicile and whatever their power under the law of that domicile to acquire a new domicile by their own action'.[13] While, however, the learned editor points out that there is no English authority which would allow a person of full age by his own law but a minor by English law to acquire a domicile in England, he fails to mention the equally important fact that there is no authority to the contrary. In short, there is no authority, a circumstance which makes the comment, unsupported by reasons, unconvincing to the writer. Professor Cheshire[14] adverts shortly to the freedom of an infant under American law to elect domicile upon marriage or emancipation,[15] and in a later passage states quite bluntly that, 'A woman who thus acquires the domicil of her husband . . . possesses no capacity whatsoever of acquiring a separate domicil of her own . . .',[16] but in neither instance is

11 Burge, *Colonial and Foreign Law* (1838); Dicey, *Law of Domicil* (1879); Westlake, *Private International Law*, 7th ed.; Foote, *Private International Law*, 5th ed.; Wolff, *Private International Law* (1945); Schmitthoff, *English Conflict of Laws*, 2nd ed.; Halsbury, *Laws of England*, 2nd ed.; and Graveson, *Conflict of Laws* (1948).

12 6th ed., p. 472. This passage is taken substantially unchanged from Dicey's 'Law of Domicile'.

13 6th ed., pp. 101–2.

14 *Private International Law* (3rd ed.).

15 *Op. cit.*, p. 236.

16 *Op. cit.*, p. 237.

the question of choice of law raised or discussed. The only other suggestion of relevance which the writer has been able to discover among English writers is to be found in Hibbert's *International Private Law*.[17] Speaking of the principle of unity of domicile of husband and wife, Hibbert remarks, 'If the law of the husband's domicil allows a wife to obtain a separate domicil she may be able to do so', citing as authority *Armitage* v. *Att.-Gen.*[18] Although this statement may be taken as supporting the view that capacity to acquire a domicile is, or should be, governed by the law of the existing domicile, the context of the passage does not justify the opinion that the learned author had this particular question in mind.

Canadian and American authorities in general have ignored this specific problem,[19] confining their attention to characterisation of the concept of domicile by the *lex fori*, the general question of capacity and capacity to perform acts other than the acquisition of domicile. Johnson in Canada, and Story, Beale and Stumberg in the United States, however, have mentioned various aspects of the question. Article 6 of the Civil Code of Lower Canada would refer capacity generally to the law of the domicile of a person residing in but domiciled outside the Province of Quebec, and Johnson,[20] in remarking on the capacity of minors that, 'upon emancipation the minor acquires the capacity to take a domicile of choice as though he were of age', presumably indicates that such capacity depends upon the law governing emancipation, *i.e.*, domicile. Whether this capacity would be recognised as effective in the place where the infant attempted to exercise it; whether, that is, the *lex fori* or *lex actus* would apply in substitution for or in addition to the former *lex domicilii* of the infant, is apparently

[17] (1918) p. 7.

[18] [1906] P. 135. The learned author admits, however, that 'the decision in that case is really only an authority for the statement that a divorce valid by the law of the husband's domicil is valid here even though the husband was not domiciled in the country granting the divorce'—*op. cit.*, p. 7. See also Morris, *Recognition of Divorces granted outside the Domicile*, 24 Canadian Bar Rev. 73 (1946).

[19] The question is not dealt with by Lorenzen (but see his *Selected Articles on the Conflict of Laws* at p. 81, where he touches on the question without, however, answering it); Kuhn, *Comparative Commentaries on the Conflict of Laws*; Cook, *Logical and Legal Bases of the Conflict of Laws*—(but see p. 462 for literature on the wife's capacity to acquire a separate domicile for divorce jurisdiction); Rabel, *The Conflict of Laws* (but see I, 146, note 184); *The Restatement of Conflict of Laws* (para. 10 merely deals with characterisation); Minor, *Conflict of Laws* (but see paras. 56 and 69); Goodrich, *Conflict of Laws* (3rd ed.) (section 21 deals only with characterisation of domicile); and Falconbridge, *Essays on the Conflict of Laws*.

[20] *The Conflict of Laws with Special Reference to the Law of the Province of Quebec*, Vol. I, pp. 92, 148.

undecided.[21] In *Deterley* v. *Wells*,[22] a married infant under his mother's guardianship (*i.e.*, he was not emancipated by marriage) attempted to acquire a domicile of choice in another jurisdiction without his mother's consent, and petitioned the court of his new residence for the removal of his disabilities as a minor. The petition was dismissed for lack of jurisdiction. Although this decision stops short of the question under consideration, it provides an example of the kind of situation in which our question would call for an answer on principle.

From Story [23] we may justifiably deduce that capacity to effect a change of domicile is governed by the law of domicile before the change is attempted,[24] though the author does not directly advert to the choice of law question in this particular instance of capacity. Stumberg [25] only touches on the question incidentally in dealing with the married woman's capacity to acquire a separate domicile from her husband for purposes of matrimonial jurisdiction, but his contribution, if limited, is nevertheless valuable. While he admits that 'The standards employed for determining domicile at a particular place are always those habitually employed at the forum',[26] he would apparently exclude capacity from the scope of such standards, referring it to the *lex domicilii*, for he writes, 'Where there has been separation by mutual consent, acquisition of a separate domicile by her would depend on the law of desertion existing at their domicile at the time of separation'.[27] By far the most important treatment of the question of capacity to acquire a domicile which the writer, with his limited access to American literature, has been able to discover, has the unique quality of being deliberate rather than incidental, and is contained in a page and a half of Beale's *Treatise on the Conflict of Laws*.[28] Beale lays down two propositions. In the first place, capacity to acquire a domicile must exist by the law of the place in which a person attempts to acquire a new domicile, and although the learned author appears to regard this as a requirement of the *lex fori*, clearly it need not necessarily be so. Such should only be the case,

21 In *Reinblatt* v. *Gold* (1928) 45 K.B. 136; [1929] S.C.R. 74, the courts of Quebec appear to have applied the *lex fori* to this question.

22 53 S.W. (2d) 847 (Texas Civil Appeals). See Note in XVII *Minnesota Law Rev.*, 548–9.

23 *Conflict of Laws*, s. 46.

24 'Seventhly, every person of full age, having a right to change his domicile, it follows, that if he removes to another place with an intention to make it his permanent residence (*animo manendi*), it becomes instantaneously his place of domicile'—*op. cit.*, s. 46.

25 *Conflict of Laws* (1937).

26 *Id.*, p. 51.

27 *Id.*, p. 41.

28 (1935) I, pp. 108–9 (s. 10 (2)).

if at all, when the attempt is made to obtain a new domicile in the country of the forum, as in fact happened in *Beekman* v. *Beekman* [29] and *Torlonia* v. *Torlonia*,[30] decisions cited by Beale in support of this proposition and dealing respectively with the capacity of minors and married women. In any event, for reasons which will appear, the *lex fori* should not be applied *qua lex fori*, but as the law of the new domicile which happens to coincide with the *lex fori*. Secondly, Beale suggests the possibility of a cumulative test of compliance with the laws of both the prior and new or intended domicile, though no authorities are offered in support. This suggestion is considered later.

Enough, and probably more than enough, has been said to prove this particular negative—to show, in other words, the absence of a principle of choice of law in the English system for determining capacity to acquire a domicile. One cannot, however, justifiably fill this gap with a positive suggestion without first attempting to show the need for so doing. Two examples which may become realities before the courts at any time may serve this purpose.

1. John, domiciled in New York State, in 1944 married in England Mary, domiciled in England. After their marriage the parties lived together in New York. In 1946 John deserted Mary and went to live permanently with Ann in Connecticut, and Mary returned to her parents' home in England, where she intends to remain. Wishing to marry again, Mary petitions in the English court for divorce. By the law of New York and Connecticut Mary would, under these circumstances, have capacity to acquire an independent domicile, and would in fact have acquired an English domicile. The English courts face a dilemma: either to refer capacity to acquire a domicile to the law of the last domicile and for this purpose to override the principle of unity of domicile of husband and wife; or to retain that principle either with the sacrifice of one even more fundamental, namely, that every person must have a domicile, or to insist that Mary should have a domicile in a State by the law of which she is domiciled elsewhere; for Mary by English law would prima facie have her husband's domicile, but by the law of her husband's domicile she certainly would not, and would be held to be domiciled in England. The court cannot escape this dilemma by a resort to renvoi, though it

[29] 53 Fla. 858, 43 S. 923 (1907). For the facts and decision, see Beale, *op. cit.*, p. 108.
[30] 108 Conn. 292, 142 A. 843 (1928).

may well do so by ignoring the choice of law question implicit in capacity to acquire an independent domicile and by treating the difficulty as a simple one of characterisation in the traditional manner.[31] This form of unconscious judicial ostrichism will no longer satisfy the social conditions of contemporary international intercourse.

2. Tom, aged 19, is domiciled in country A, by the law of which he is of full age. He acquires an independent domicile of choice in country B, recognised as valid by the law of both A and B, and enters into a transaction in England of a kind in which capacity is referred to the personal law, *e.g.*, marriage[32] or a marriage settlement.[33] Can the English courts in such a case refuse to accept Tom's capacity to acquire a domicile, the only basis on which reference may be made in a realistic sense to his personal law for the purpose of the transaction in question?

Whatever accepted theory one favours as the basis of the English conflict of laws it is obvious that practice will fall short of precept if the English courts in situations such as those mentioned above fail to consider the question of capacity to acquire a domicile: the vested right will be denied recognition; the *lex fori* will fail to create and enforce a right as closely assimilated as possible to that existing under the relevant foreign law; the alleged international validity of concepts will be violated; and less than a practicable ideal of justice will probably be done.

The chief difference between capacity to acquire a domicile and capacity for any other act, particularly if such capacity depends on domicile, is one of degree rather than of kind. Capacity to acquire a domicile is more fundamental, since its exercise brings into operation a personal law on which various other capacities depend. Should this form of capacity, then, be referred to some higher law than that governing the capacities which flow from its exercise? Is there, in fact, a higher law to which it could be referred? In considering what law should govern this capacity, we may start from a familiar quotation of high judicial authority. In *Udny* v. *Udny*,[34] Lord Westbury observed, '. . . the civil status is governed universally by one single principle, namely, that of domicile, which is the criterion established by law for the purpose of determining civil status. For it is on this basis that the personal rights of the party, that is to say, the law which determines his majority or

[31] *Re Martin* [1900] P. 211; *Re Annesley* [1926] Ch. 692.
[32] *Brook* v. *Brook* (1861) 9 H.L.C. 193.
[33] *Cooper* v. *Cooper* (1888) 13 App.Cas. 88.
[34] (1869) L.R. 1 H.L. (Sc.) 441.

minority, his marriage, succession, testacy or intestacy, must depend '. More recent authority has added explanatory qualifications on this principle. In the first place, a substantial identity of concepts of domicile between the relevant legal systems is a prerequisite to the uniform application of rules for the acquisition of domicile, including the rule of capacity.[35] Secondly, Professor Cheshire [36] has emphasised the relative nature of capacity, citing a dictum of Lord Greene, when Master of the Rolls, in a case involving the somewhat special facts of recognition of a polygamous marriage.[37] Thirdly, the English courts, while accepting what Scott L.J. called ' the quality of universality ' of status,[38] impose their own limitations on the exercise in England of the incidents of status,[39] of which, it is confidently submitted, capacity to acquire a domicile is one. The first and third of these qualifications are of a negative nature, dealing with the abnormal and exceptional case, and need not concern us at this point. Of immediate importance is the second, that of the relational nature of capacity to the act to which it is directed.

Capacity to acquire a domicile is capacity to choose a personal law, a fact which necessarily determines the considerations to be taken into account in selecting the law to govern this capacity. The relevant factors may be considered as (1) legal, (2) functional, (3) social and (4) individual.

(1) *Legal factors.* Since capacity to undertake the most important transactions of personal law, such as marriage, succession to movables and divorce jurisdiction, is governed by the law of the domicile,[40] and since, further, the law of the domicile has been said to govern capacity generally,[41] it would seem both in accord with principle and not contrary to authority to submit to the same law capacity to acquire domicile itself. Two of the possible legal consequences of so doing, however, clearly appear from the examples given above—that the English courts may be called upon

[35] *Re Annesley* [1926] Ch. 692. This question of characterisation will be referred to later.

[36] *Op. cit.*, p. 256.

[37] *Baindail* v. *Baindail* [1946] P. 122, at 128.

[38] *Re Luck's Settlement Trusts* [1940] 1 Ch. 864.

[39] Dictum of Littledale J. in *Birtwhistle* v. *Vardill* (1826) 5 B. & C. 438, 455. This question is considered at greater length in the writer's *Conflict of Laws*, pp. 90–93, and in XXVI *Journal of Comparative Legislation* (3rd series), pp. 27 ff.

[40] It is considered unnecessary to cite the well-known authorities for these statements.

[41] Dictum of Lord Westbury cited above: *acc.* as to general capacity to contract, dicta in *Sottomayor* v. *de Barros* (1877) L.R. 3 P.D. 1, at p. 5; *Cooper* v. *Cooper* (1888) 13 App.Cas. 88. Cf. *Male* v. *Roberts* (1799) 3 Esp. 163, and *Baindail* v. *Baindail* (above), dictum of Lord Greene M.R.

to recognise both the independent domicile of a married woman in England and the domicile of choice in England or elsewhere of a person who, for lack of age, would lack capacity to acquire a domicile by English law in its narrower and municipal sense. As to the first of these possibilities, the Court of Appeal in *De Reneville* v. *De Reneville* [42] has already gone some way on the path towards establishing the premise for such a consequence,[43] while the acceptance of the possibility of a married woman's establishment of a separate domicile under certain circumstances would remove an injustice which has long been recognised and sensibly dealt with in the United States,[44] Lower Canada,[45] France,[46] Germany,[47] and other countries, an injustice which in English law the half-hearted statutory attempts [48] to preserve both divorce jurisdiction and the principle of unity of domicile of husband and wife have done little to mitigate. The result is that the married woman may dispose of her own property, make her own contracts, commit her own torts, but never acquire her own domicile.[49] This consequence of the reference of capacity to acquire a domicile to the law of the domicile is no disadvantage to the rule, but a step towards that form of justice which English judges have sworn to administer.[50]

The second consequence need cause little concern. The cases in which the reference of capacity to the law of a person's domicile would induce the application (because of a difference in the age of majority) of a different rule from that of English law would be infrequent. It might involve the application of a foreign domiciliary rule of greater liberality or greater strictness than the English. But precedents [51] in cases of capacity normally referred to the *lex domicilii* provide analogies which indicate at least that the English courts would not be embarrassed by the situation presented in the case of a person of full age by his domiciliary law, though a minor by English law (or the converse), seeking to acquire an English domicile.

[42] [1948] P. 100.
[43] See further the writer's comments in *Recent Developments in Nullity of Marriage*, 12 *The Conveyancer* 185, especially 196 (1948).
[44] Restatement, *Conflict of Laws*, s. 28.
[45] Code Civil, Art. 108, as amended.
[46] Civil Code, s. 10.
[47] Civil Code, Art. 207; Johnson, *op. cit.*, I, 144.
[48] Matrimonial Causes Act, 1937, s. 13; Matrimonial Causes (War Marriages) Act, 1944.
[49] See Dr. Kahn-Freund's note on the domicile of married women, in 5 *Modern Law Review* 66 (1941).
[50] Graveson, *Conflict of Laws*, p. 6.
[51] *Simonin* v. *Mallac* (1860) 2 Sw. & Tr. 67; *Sottomayor* v. *de Barros* (2) (1879) L.R. 5 P.D. 94; *Ogden* v. *Ogden* [1908] P. 46; *Re Hellman's Will* (1866) L.R. 2 Eq. 363.

Finally, the courts would be called upon to distinguish the scope of characterisation of the concept of domicile, governed on authority by the *lex fori* when such is English [52] or American,[53] from capacity to acquire a domicile, which in any particular instance is separate from and necessarily prior to the concept of domicile itself. The English authorities which have established the exclusive power of the *lex fori* to apply to all cases the domestic concept of domicile have left this distinction untouched, for, so far as the writer has been able to discover, no case of this kind has been reported in England necessitating the making of the distinction.

(2) *Functional factors.* The choice of law rule to govern capacity to acquire a domicile should serve the same purpose as domicile itself, once acquired. The general purpose of the concept of domicile as establishing a voluntary legal relation between a person and a legal system on the basis of residence and membership of a civilised society so as to induce the application of the law of that society to the most important acts of the person is too familiar to require argument. Because the law of domicile ensures compliance with its standards in such matters as marriage, divorce and legitimacy by the exclusive application to these personal situations of its own law, a positive reason is provided for determining by the same law capacity to acquire domicile.[54] A negative reason in favour of this choice of law exists in the absence of any other solution offering the same degree of logic, functional efficacy, consistency with authority and justice.

(3) *Social factors.* Inseparably bound to the functional purpose of domicile are the social factors for which the concept exists. The concept of domicile and the various functions which it performs in matters of personal status and jurisdiction constitute a section of legal machinery designed to fit the individual and his family into the legal pattern of the community of which they form part. By means of this machinery the legal system maintains the legal validity of those transactions, and only those, which conform to the standards of its particular society in such matters, for example, as domestic relations. While this factor constitutes the prime justification for the reference of capacity to acquire a domicile to the domiciliary law, it carries with it an inherent conflict of social interests, for there is not one domiciliary law involved, but two. Assuming for the moment that capacity of this kind should be

[52] *Re Martin* [1900] P. 211; *Re Annesley* [1926] Ch. 692.
[53] Restatement, *Conflict of Laws*, s. 10.
[54] The question of the law of which domicile, the old or the new, is deferred for the moment.

referred to the law of the domicile, should this law be that of the old or the new domicile, the present or the intended one? Both systems could probably present an equally strong case for their respective claims to be the governing law. On the one hand the society of which X is a member may justifiably claim to regulate the conditions on which he may abandon his membership : on the other, the society of which he intends to form a part may, with no less justification, prescribe its conditions for joining. A close analogy in English law lies in the divergent views as to what law governs capacity to marry. The traditional view favours the law of the existing domicile of each party immediately before marriage,[55] while a modern view, most notably expressed by Professor Cheshire [56] and once recently adopted by the Court of Appeal,[57] advocates a choice of law in favour of the law of the intended matrimonial home. Much of what has been said and written on this point applies equally, *mutatis mutandis*, to the choice of law problem considered in this paper. In both cases it is clear that adequate recognition of substantial social interests can only be ensured by postulating compliance with the law of one or other, or possibly both, of the old and new domiciliary systems. In both cases, if a choice must be made, as in the case of capacity to marry it has been made (though without consistency), the fact that, *ex hypothesi*, X is a member of the community of which he forms part, but not yet of that which he desires to join, gives considerably augmented force to the claim of the law of an existing domicile to govern capacity of either kind.

(4) *Individual factors.* But what about Mary, whom we left some way back trying to convince the Divorce Division of her independent English domicile; and Tom, who by the law of countries A and B, though possibly not by English law, is domiciled in country B? A most important characteristic of domicile as a basis of the personal law is that the acts on which it is legally conferred remain even today manifestations of the freedom of choice and action of the individual, provided he or she is of full age, sound mind and, we must add illogically in the case of women, unmarried. If the purpose of domicile is to regulate man in society, the method and freedom of choice in its acquisition embody the individualism of the common law and bear the hall-mark of *laissez-faire* which characterised the period of its mid-nineteenth century development. No principle of choice of law to determine capacity to acquire a

[55] Dicey, *op. cit.*, Rule 168.
[56] *Op. cit.* (3rd. ed.), p. 269.
[57] *De Reneville* v. *De Reneville* [1948] P. 100.

domicile can hope to fit the general pattern and character of this concept if it ignores the interest of the individual. From his point of view clearly the most desirable rule would be one which always selected the most liberal system to govern his capacity, as was done in the case of the infant legatee, where Lord Romilly M.R., in a judgment conspicuous for its brevity and complete lack of reasoning, held, 'The legacy to the son may be paid to him on his attaining full age according to English law or according to the law of Hamburg, whichever first happens'.[58] It is considered unlikely that the courts would apply this liberal alternative theory to capacity to acquire a domicile, and would be more likely to regard the individual's interests as adequately secured by the application of the law of one or both of the two domiciliary laws which he has, or must be presumed to have, chosen to govern his status and capacity.

In the light of the relevant factors, including those briefly mentioned above, we are now in a position to consider the various possible alternative solutions to the choice of law problem raised by capacity to acquire a domicile. Six possibilities are suggested :

(1) The law of the domicile existing at the time of the contemplated change (which may shortly be called the law of the old domicile). Some reasons for preferring this first alternative have already been stated. It only remains to add to them the further argument that this law must apparently determine the conditions, including capacity, on which it may be abandoned, a function in which no other law can seriously claim to compete. Moreover, selection of the law of the old domicile would have the further great advantage of providing a single choice of law rule to include not only the normal case of acquisition of a domicile of choice on one's own behalf, but capacity to change the domicile of persons legally dependent on one. The social interest of a State in those of its domiciled members under the disabilities of infancy, lunacy or marriage may well be thought to exceed that of the State to which their domicile is to be arbitrarily changed by the person on whom they are dependent in matters of domicile.

(2) The law of the country in which a person desires to become domiciled (which may shortly be called the law of the new domicile). The strong claims of this law have been considered above. While the individual interest in the choice of this law may be stronger than that in respect of the

[58] *Re Hellman's Will* (1866) L.R. 2 Eq. 363; *Re Schnapper* [1928] Ch. 420.

old domicile, it is submitted in the first place that the social interest involved is smaller and the legal objections significant, and secondly, that this greater individual interest only exists in the case of a person wishing to change his own domicile. It can hardly apply to the case of persons under disability.

(3) The *lex fori*. This is an unsatisfactory choice for several reasons. In the first place, the identity of the *lex fori* is unknown until litigation is instituted, and even thereafter the choice of law rule cannot precede the decision in which it is embodied. Secondly, until such decision there is in this matter no law of the forum, assuming the latter to refer to an English court. Thirdly, the *lex fori* may be completely unrelated to the law of either the old or the new domicile, as in the second example given above. Fourthly, the application of the *lex fori* to this question of capacity would be a retrograde step towards the seventeenth century assimilation of choice of law and choice of jurisdiction. Fifthly, it is noteworthy that only in a limited sense and for special purposes in the case of non-recognition of the incidents of a foreign status [59] does the *lex fori* claim to control capacity to perform any act in the conflict of laws; and in all such cases, except those in which the overriding effect of public policy is involved,[60] the intervention of the *lex fori* results in an increase, not a reduction, of capacity conferred by the personal law.[61] It was thought necessary to consider the *lex fori* as a possible alternative only because of the danger which exists of treating capacity as falling within the scope of characterisation of the concept of domicile. Nothing needs to be added to what has already been said of the distinction in nature between the concept of domicile and capacity for its acquisition, or of the consequent independence of the choice of law rule applicable to capacity from the reference of characterisation of the concept to the *lex fori*.

(4) The proper law. This modern relative concept of ever-expanding scope may be invoked to govern capacity for the acquisition of domicile, but its acceptance would leave

[59] *Sottomayor* v. *de Barros* (2) (1879) L.R. 5 P.D. 94; *Chetti* v. *Chetti* [1909] P. 67; *Worms* v. *De Valdor* (1880) 49 L.J.Ch. 261; *Re Selot's Trusts* [1902] 1 Ch. 488.

[60] *Chetti* v. *Chetti* (above); *R.* v. *Superintendent Registrar of Marriages, Hammersmith, Ex p. Mir-Anwaruddin* [1917] 1 K.B. 634.

[61] *Somerset* v. *Stewart* (1772) Lofft 1; *Worms* v. *De Valdor* (above); *Re Selot's Trusts* (above).

undetermined any general solution of the conflict of claims between the law of the old and new domicile. On the analogy of its recent and uncertain application in respect of the essential validity of a marriage, including presumably capacity to marry,[62] to which reference has already been made, one would expect the proper law governing capacity to acquire a domicile to look towards the law of the new domicile rather than any of the other possible alternatives. The concept of proper law is essentially individualistic in character and purpose. It is based on both the idea of liberty of contract and factors of real connection, and it is thought that its application to capacity for domicile would give insufficient recognition to the social interests involved, or at least to those of the old domicile. And because the acquisition of domicile, involving as it may do a complete change of personal law, is not a matter of purely individual concern, the proper law is considered inappropriate for the purpose in hand.

(5) The law most favourable to the acquisition of the new domicile. Little need be said of this exclusive realisation of the interests of the individual. If it is possible to devise a rule which would have this effect while at the same time securing the important social interests involved, so much the better; but in such an event the selection of the law most favourable to the interests of the individual would be merely a fortunate by-product of other considerations. It is partly on the ground of the difference in importance of such interests that the decision in *Re Hellman's Will* [63] is distinguishable, and loses much of its validity as a precedent for the introduction of a similar rule to govern capacity to acquire a domicile.

(6) Finally, one may refer to the possibility of a cumulative rule. Capacity, for example, may be referred to the law of both the old and new domiciles, or to either or both of them and the *lex fori*. A notorious and almost isolated example of this process exists in the law of tort, and one cannot claim for it any conspicuous success. On a question of choice of law the claim of *lex fori* merely as *lex fori* should be discounted. From the aspect of a complete securing of social interests a cumulative test based on the law of both domiciles has attractions, but on close examination it is

[62] *De Reneville* v. *De Reneville* [1948] P. 100.
[63] (1866) L.R. 2 Eq. 363.

clear that all one would be doing in any case of conflicting standards of capacity would be to give effect to the social claims of that law which imposed the more rigid standard, while at the same time sacrificing not only the interests of the individual, but also those of the other domiciliary law to allow its subjects to contract at an earlier age or otherwise under more liberal conditions. Cumulative rules are troublesome and unsatisfactory. To extend their scope unnecessarily denotes an attitude of despair towards the systematic nature and development of the conflict of laws.

That possible dangers exist in the adoption of any unitary choice of law rule, such as that here suggested, must be admitted. But such dangers, if they exist or arise, may be avoided by the overriding principles of the *lex fori* applicable to all transactions which offend against ideas of public policy, morality or statute law (such as the Age of Marriage Act, 1929), while the limits of recognition of the incidents of a foreign status and the judicial machinery and procedure of the *lex fori*, as was seen in *Hyde* v. *Hyde*,[64] provide a further safeguard quite outside the province of rules for the choice of law. Into this working pattern of English law no new rule for the choice of law in matters of capacity to acquire a domicile could take its place more easily or more in conformity with principle and tradition than one which would refer such capacity to the law of the old domicile.

It must be emphasised that the problem which has been reviewed raises no question of choice of jurisdiction, but merely one of law. For the purpose of narrowing the discussion in its initial stages and confining it to the major question of principle involved, it has been assumed that the same choice of law rule would apply, in the first place, to the abandonment of the old domicile as to the acquisition of the new[65]; secondly, to capacity to acquire a domicile of choice for the first time, *e.g.*, on attaining majority, as to a change from one domicile of choice to another; thirdly, to persons of any age, sex or condition; and finally, to the capacity of an independent person to change the domicile of a person dependent for this purpose on him.

R. H. Graveson.[66]

[64] (1866) L.R. 1 P.D. 130.

[65] This assumption is only justifiable if the suggestion in favour of the law of the old domicile is accepted.

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THE COUNCIL OF EUROPE

The Latest Development in the Trend Toward Closer Co-operation Among the Western European States

EUROPE, with its customs barriers, diversified monetary systems, competing policies of economic nationalism, political rivalries, and accumulated national hatreds, has caused intelligent thinkers over the centuries to ask whether this improvident division of the Continent is inevitable. Despite its great natural wealth, its rapid progress in economic development, and its dominating cultural influence, the continual internecine struggles which have devastated its resources and debilitated its inhabitants have resulted in Europe's losing its position of leadership in the world. One of the foremost questions of our time is whether or not Europe can overcome its internal differences and so aspire once again to its former position.

Recent years have seen a renewed interest in the concept of a United Europe and an increased endeavour on the part of the Western World's statesmen to accomplish this goal. The impetus derived from current developments has produced surprising results in the short space of time that has passed since the end of World War II, particularly when contrasted with the failure of the major inter-war effort to achieve European unity, the Briand Plan.[1] The United Nations, working through the Economic and Social Council, has created an Economic Commission for Europe to consider the economic problems of the Continent as a whole and bring about co-operation between its many branches of economic endeavour.[2] The Belgium, Netherlands and Luxembourg Customs Union Agreement (commonly known as the Benelux) was signed on March 14, 1947, marking the first modern attempt to create a European Customs Union on so large a scale. The United Kingdom, France, Belgium, Luxembourg, and the Netherlands signed a fifty-year 'Treaty of Economic, Social and Cultural Collaboration and Collective Self-Defence' in the following year at Brussels (the Brussels Treaty).[3]

[1] The plan proposed by the then Foreign Minister of France, Aristide Briand, in the League of Nations General Assembly. See: Documents Relating to the Organisation of a System of European Federal Union, Series of League of Nations Publications VII, Political, 1930, Vol. 4, pp. 1–77; Vol. 5, pp. 1–2.

[2] U.N., E.C.O.S.O.C., 'Terms of Reference for the Economic Commission for Europe', Document E/CN.10/1 April 3, 1947; See also: 'Report of the Economic Commission for Europe on the First and Second Sessions of the Commission', Document E/451,451 add. 1, of July 29, 1947, pp. 2–3.

[3] March 17, 1948, See: Treaty Series No. 1, 1949; This Treaty entered into force August 28, 1948.

This agreement, unprecedented among Western European States, was complemented a month later by the 'European Economic Co-operation Convention'[4] concluded by sixteen nations of Europe in an attempt to utilise to the fullest their joint resources for the rehabilitation and development of Western Europe in connection with the European Recovery Programme. The North Atlantic Treaty, signed in Washington on April 4, 1949,[5] marked another significant step in the collective self-defence of Western Europe and a powerful extension of the military provisions of the Brussels Pact.

Formation of the Council of Europe

These developments in European co-operation, impressive though they are, were inadequate in many respects. The Brussels Pact was too predominantly defensive in character to hold comfortably such nations as Germany, Italy, Denmark and Norway. A new political organ was needed if new Members were to be included. The Organisation for European Economic Co-operation, while embracing nearly all the Western European countries, was too much concerned with the practical details of trade and finance to serve as the common political centre for its Members. There was a definite need for an organisation broader in its membership than the Brussels Pact and less concerned with technical matters than the O.E.E.C. to serve as the centre of West European authority and to express the growing feeling of West European unity. This need in all probability had been clear to the Governments of the Western European Nations for some time. However, the creation of the Consultative Assembly of the Council of Europe can be traced to a resolution of the Political Section of the Hague Congress of 1948, convened by the European Movement, a private organisation of international influence.[6] The resolution called for the convening of

[4] Austria, Belgium, Denmark, France, Greece, Ireland, Iceland, Italy, Luxembourg, Norway, the Netherlands, Portugal, the United Kingdom, Sweden, Switzerland, Turkey and the Commander-in-Chief of the French, United Kingdom and United States Zones in Germany. (The Commander-in-Chief of the three occupation zones in Germany was replaced by the Federal Republic of Germany on October 31, 1949, and the Commander-in-Chief of the United Kingdom and United States Zone of Trieste has been added so that at the present time there are eighteen participants in the Convention for European Economic Co-operation.) Paris, April 16, 1948, see: British White Paper, Cmd. 7388; His Majesty's Stationery Office, Miscellaneous No. 4, 1948.

[5] For text see: U.S. Department of State Publication No. 3464 of 1949; this Treaty came into effect August 24, 1949; See: U.S. Department of State Bulletin of September 5, 1949, p. 355. The Signatories of the North Atlantic Treaty are Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, the United Kingdom and the United States.

[6] 'European Movement', *Europe Unites, The Hague Congress and After*, 1949, p. 38.

a European Assembly to be chosen by the parliaments of the participating Nations. The purpose of the Assembly was to be the stimulation and expression of European public opinion. It was to give advice to governments upon practical methods of bringing about the economic and political union of Europe, examine the constitutional and judicial implications of such a union and their economic and social consequences, and to prepare the necessary plans for accomplishing these purposes.

Copies of these proposals were handed to each of the Ministers on the Consultative Council of the Brussels Treaty when they met at the Hague on July 19, 1948.[7] These proposals were adopted in a modified form by France and Belgium and presented to the Consultative Council for its consideration. The French and Belgian Governments felt that a deliberative assembly could give expression to the broad current of European public opinion and prepare the people of Europe for a sacrifice of national sovereignty. The French also thought it would be a wiser policy for the immediate future to have Germany a member of an assembly with no executive or legislative authority rather than a member of an organisation with executive powers. The British Government, while heartily in favour of increasing practical co-operation between European Governments, thought that such an assembly, free to criticise and make recommendations, yet with no responsibility or power, would do more harm than good by creating a false sense of security. It might discredit the idea of European Union by raising false hopes in European minds, leading to eventual disillusion.

The Consultative Council of the Brussels Treaty Powers in Paris on October 25, 1948, appointed a committee to study the Franco-Belgium proposal together with a counter British proposal for the creation of a ministerial council appointed by and responsible to governments rather than parliaments. The British Government was prepared to accept as a compromise the creation of an authoritative ministerial council, together with a consultative assembly, provided the subject of defence was excluded from the consultative assembly. The British Government, however, wanted the members of the assembly to be appointed by the governments concerned rather than by the parliaments, and to vote as a single unit instead of as individuals. The committee failed to agree, but the Foreign Ministers adopted a compromise. The task of drafting a convention was assigned to the Permanent Commission created under the Brussels Treaty, and the compromise was embodied in the Statute

[7] 'Western European Union', *The World Today*, February, 1949.

of Europe as finally adopted.[8] The compromise provided that the question of defence was to be outside the jurisdiction of the Council of Europe. Members of the Consultative Assembly were to be chosen by governments in any manner they pleased, but the members were to vote as individuals. Invitations to attend a conference in London for the purpose of creating a Council of Europe were sent to the Governments of Denmark, Eire, Italy, Norway and Sweden by Mr. Bevin as Foreign Secretary of the host government on behalf of Belgium, France, Luxembourg, the Netherlands and the United Kingdom.[9]

The Statute

The signing of the Statute of the Council of Europe by ten European Countries[10] in London on May 5, 1949, marked the culmination of centuries of endeavour to form a joint assembly of European States. The reasons which led to the formation of the Council of Europe are set forth in the preamble of the Statute. There it is stated that the Governments of the Member Countries:

> 'Convinced that the pursuit of peace based upon justice and international co-operation is vital to the preservation of human society and civilisation;
>
> Reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy;
>
> Believing that, for the maintenance and further realisation of these ideals and in the interests of economic and social progress, there is need of a closer unity between all like-minded countries of Europe;
>
> Considering that, to respond to this need and to the expressed aspirations of their people in this regard, it is necessary forthwith to create an organisation which will bring European States into closer association;
>
> Have in consequence decided to set up a Council of Europe consisting of a Committee of Representatives of Governments and of a Consultative Assembly, and have for this purpose adopted the following statute:—'

[8] R. G. Hawtrey, *Western European Union*, 1949, pp. 26–34; See also: *The Times*, January 4, 1949, p. 4; January 25, 1949, p. 4; January 26, 1949, pp. 4, 5; February 4, 1949, p. 4; March 4, 1949, p. 3.

[9] *The Times*, March 8, 1949, p. 4.

[10] Belgium, Denmark, France, Eire, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom; the Statute of the Council of Europe, London, May 5, 1949, Treaty Series No. 51, 1949, Cmd. 7778. On August 8, 1949 Greece and Turkey became members bringing the number of participating countries to twelve.

The aim of the Council of Europe, set forth in Article 1 of the Statute, is to achieve a greater unity between its Members for the purpose of safeguarding the principles of their common heritage and facilitating their economic and social progress. The Members are to seek the realisation of these aims by using the two organs of the Council, the Committee of Ministers and the Consultative Assembly, for discussions, the reaching of agreements, and the determination of common action. Participation in the Council is not to affect the collaboration of Members in the work of the United Nations or other international organisations. An important limitation on the work and function of the Council is the exclusion of matters of national defence from its scope (Article 1 (d)).

Membership in the Council is open to all European States on the invitation of the Committee of Ministers. Prospective Members must first, however, accept the principles of the rule of law, human rights, fundamental freedoms, and agree to collaborate in the realisation of the aims of the Council. They then become Members of the Council on the deposit of their instruments of accession to the Statute with the Secretary-General of the Council (Article 4). Provision is also made in special circumstances for Associate Members who have representatives in the Consultative Assembly only (Article 5). This provision was inserted to make way for the inclusion of Austria, Germany, and the Saar in the near future. Since these countries are occupied, and their foreign affairs are in the hands of the occupying Powers, they could not be expected to send Foreign Ministers to the Committee of Ministers. They do, however, have internal governments of their own at this time, and pending the conclusion of peace treaties and their assumption of control over their foreign affairs, they could send parliamentary representatives to the Consultative Assembly. Thus the way was cleared for these countries to participate in the Council of Europe before they again attain complete independence. Since they are not likely to achieve complete independence for a considerable time, this would seem to be a wise procedure. As Associate Members they will have a chance to co-operate with the other Members in the Assembly, observe and be observed, and establish a feeling of mutual co-operation before they are admitted to the executive organ of the Council where their Foreign Ministers would have a decisive vote. It is to be hoped, however, that these Countries will become full Members on completely equal terms with the other Members as soon as possible. Any attempt to unify Europe without them would be incomplete and foredoomed to failure.

The number of Representatives in the Consultative Assembly for new Members and the amount of their financial contribution are to

be fixed by the Committee of Ministers before they are invited to join (Article 6). Members of the Council of Europe may withdraw upon giving formal notice to the Secretary-General (Article 7). States that have seriously violated the principles of the Statute or failed to meet their financial obligations may be asked to withdraw, or expelled or suspended by the Committee of Ministers (Articles 8 and 9).

The Organs of the Council of Europe, the Committee of Ministers and the Consultative Assembly are to be served by a Secretariat. The Seat of the Council is to be Strasbourg, and its official languages are English and French.

(*a*) *The Committee of Ministers*

The most important of the two organs created by the Statute is the Committee of Ministers, which exercises the limited executive and legislative powers of the Council of Europe. The Committee, on its own initiative or on recommendation from the Consultative Assembly, is to consider actions required to further the aims of the Council. It may consider the conclusion of conventions and agreements to be adopted by the Member Governments and the adoption by Governments of common policy in regard to particular matters. It may make recommendations to Members and request that it be informed as to the actions taken by the Governments in regard to these recommendations (Article 15).

Aside from certain provisions relating to the establishment of rules of procedure by the Consultative Assembly, the date and place of meetings of the Assembly and the right of the Assembly to hold public debates unless it decides otherwise, the Committee of Ministers makes the final decisions on all matters relating to the internal structure and procedure of the Council of Europe (Article 16). It may create special committees and advisory and technical committees (Article 17), and adopt its own rules of procedure (Article 18). These rules of procedure are to establish the term of office and method of selection of its President, the procedure for putting items on the agenda, and the number of Ministers required for a quorum.

The Foreign Ministers of the Member Countries compose the Committee of Ministers (Article 14). They are to meet at the Seat of the Council before and during the beginning of every session of the Assembly, but other meetings may be held at their discretion (Article 21). The Committee is required to furnish a complete statement of its activities accompanied with appropriate documentation to the Assembly at each of its sessions (Article 19).

A unanimous vote of the Representatives actually voting and a majority of all the Representatives on the Committee of Ministers are required in making decisions in the following cases : Recommendations by the Committee to Member Governments, reports of the Committee's activities to the Assembly, decisions as to whether the Committee meetings are to be private and the amount of information concerning meetings to be made public, decisions as to where the Assembly shall meet, amendments to the Statute regarding the organisation of the Council (Articles 1 (d), 7, 15, 20, 22), and any other question which the Committee shall decide shall be determined by a unanimous vote (Article 20 (a)). New Members of the Council of Europe are admitted by a two-thirds majority vote of all of the Representatives on the Committee of Ministers (Article 20 (c)), while a simple majority vote is required on questions of finance and procedure (Article 20 (b)). All other resolutions of the Committee require a two-thirds majority of those Ministers actually voting and a majority of the Representatives on the Committee.

The provisions concerning voting in the Committee of Ministers, the executive organ of the Council, make it clear that the Committee is subject by the unanimity rule to the veto of any one Member for its most important activities; making recommendations to Member Governments, reporting its activities to the Assembly where they can be discussed in public, deciding what part of the activities of its meetings is to be disclosed to the public, and in proposing amendments to the essential organisational structure and powers of the Council of Europe. Clearly no national sovereignty has been sacrificed to the concept of a unified Europe by this Statute. However, it is of significance that absolute unanimity is not required. States may abstain from voting on measures and still be bound if a sufficient number of States are in favour of the measure and no State feels strongly enough against it to exercise its right of veto.

(*b*) *The Consultative Assembly*

Very great popular interest has been aroused by the Consultative Assembly. This interest, which is entirely disproportionate to the modest powers held by the Assembly, is due to its novelty, and the popular appeal of the concept of a European Parliament. There is, however, very little similarity between a national parliament and the Consultative Assembly. The Assembly has no executive or legislative power. It is designed solely as a deliberative body for the formulation and expression of European public opinion.

A unique feature concerning the Delegates to the Consultative Assembly is the manner in which they are chosen. The Statute leaves the method of selection to the discretion of each Government. The English Representatives were appointed from among members of parliament, not only members of the Government Party but members of the Opposition as well. Ten of the French Delegates were elected by the National Assembly, five were elected by the Council of the Republic, and three were appointed by the French Government. There is serious talk in France of choosing the Delegates to the Consultative Assembly by direct popular election. So we have an international assembly elected indirectly by the people of the participating Countries, as in the case of those chosen from among parliament members, and a possibility that in the future Representatives may be elected by direct vote of the people. This is a unique and extremely interesting development in the field of international organisations.

The powers of the Consultative Assembly are extremely curtailed. It is to debate matters within its competence under the Statute, and present its conclusions in the form of recommendations to the Committee of Ministers (Article 22). The Assembly, according to the Statute, may only make recommendations on matters that have been specifically referred to it by the Committee of Ministers with a request for the Assembly's opinion or have been approved by the Committee for inclusion on the Assembly's agenda (Article 23). This is a decided limitation on the scope of the Assembly's range of action and one that subordinates it to the Committee of Ministers.

The Consultative Assembly has the power to establish committees and commissions to keep itself informed on special subjects (Article 24). It adopts its own rules of procedure, and elects its own President (Article 28). Each Delegate to the Assembly must be a national of the Country he represents, and cannot be a member of the Committee of Ministers (Article 25). Belgium has six representatives, Denmark four, France eighteen, Luxembourg three, the Netherlands six, Norway four, Sweden six, and the United Kingdom eighteen. Turkey, Greece and Iceland were allotted eight, six, and three Delegates respectively when they were invited to join the council.[11]

Resolutions of the Consultative Assembly, in general, are to be carried by a two-thirds majority of those voting, but the Assembly may determine, by a two-thirds vote, that certain procedural

[11] Report on the Proceedings of the First Session of the Council of Europe, His Majesty's Stationery Office, Miscellaneous No. 4, 1949, Cmd. 7807, p. 4.

matters may be decided by some other type of majority vote (Articles 29, 30). The Assembly is to meet once a year in ordinary session, the duration of which it fixes itself. The session may not last more than a month, however, unless the Consultative Assembly and the Committee of Ministers both agree to the extension. Sessions of the Assembly are to be held at its Seat in Strasbourg unless the Assembly and Committee agree to hold them elsewhere. Special meetings of the Assembly may be called by the Committee of Ministers with the concurrence of the President of the Assembly. Unless the Consultative Assembly decides otherwise its meetings are to be public.

(*c*) *General Provisions*

The Council of Europe is to have a permanent Secretariat to serve both the Committee of Ministers and the Consultative Assembly. The Secretariat is to be headed by a Secretary-General and Deputy Secretary-General, appointed by the Assembly on the recommendation of the Committee. Such other staff as may be required is to be appointed by the Secretary-General. M. Camille Paris, of France, and Mr. A. S. Halford, of the United Kingdom, both career foreign service officers in their respective countries, have been appointed to the posts of Secretary-General and Deputy Secretary-General respectively.[12] The Committee of Ministers at its second session, in response to a request from the Assembly, agreed to the appointment of a ' Chief of Administrative Services ' for the Consultative Assembly. He is to have the rank of a Deputy Secretary-General.[13]

No member of the Secretariat is to be a salaried officer of a government, a Delegate to the Assembly, or is to engage in any activities incompatible with his duties. The personnel of the Secretariat must make a solemn declaration affirming their duty to the Council of Europe. They must state they will be uninfluenced by national considerations and will not seek instruction from any government in the performance of their duties. States of the Council of Europe are required to respect the international character of the responsibilities of the Secretary-General and the staff of the Secretariat, and are not to try and influence them in the discharge of their duties (Article 36). The Secretariat is to be located at the Seat of the Council.

Member Countries are to pay the expenses of their representatives on the Committee and in the Assembly. The expense of the

[12] Report on the Proceedings of the First Session of the Council of Europe, *op. cit*, p. 4.
[13] *The Manchester Guardian*, November 4, 1949.

Secretariat and the other common expenses are to be shared in proportions to be determined by the Committee of Ministers on the basis of population (Article 38).

The Council of Europe, the Ministers, Delegates to the Assembly, and the Secretariat, are to enjoy such privileges and immunities in the territory of the participating nations as are reasonably necessary for the fulfilment of their functions. Conventions are to be concluded among the States as soon as possible to achieve this end and a special agreement is to be concluded with the French Government defining the privileges and immunities which the Council shall have at its Seat. These immunities are to include immunity for the Delegates of the Consultative Assembly from arrest and all legal proceedings in the territory of the Member States resulting from words spoken or votes cast in the debates of the Assembly or its committees or commissions.

Provision is made for amendment of the Statute at the proposal of the Committee of Ministers, or the Consultative Assembly if the matter has been referred to them by the Committee, by the ratification of two-thirds of the States. However, after the second ordinary session of the Assembly has been held, amendments concerning the power and scope of the Assembly within the limits of the Statute, and the arrangements regarding the financing of the Council, may be made by the approval of the Committee of Ministers and the Consultative Assembly without ratification by Members. It is to be noted that this provision relates to the technical and administrative aspects of the Assembly only and cannot be used to broaden its powers. The Articles that can be so amended without ratification by the Members are limited by Article 22 which restricts the power of the Assembly to debating matters within the scope of the Statute, and presenting its conclusions in the form of resolutions to the Committee of Ministers.

The Council of Europe officially came into being on August 3, 1949, when the Luxembourg, Norwegian and Italian instruments of ratification were deposited with the Government of the United Kingdom in London. The United Kingdom, Denmark, Sweden and Eire had already deposited their instruments of ratification making the total of seven ratifications required by Article 42 of the Statute. Since that time three other countries have ratified the Statute and two non-signatories have deposited their instruments of accession.

The First Session of the Council of Europe

The attention of Europe, and all the world, was focused on Strasbourg when the first session of the Council of Europe opened

on August 8, 1949. The Foreign Ministers of the Signatory Powers and a distinguished group of European parliamentarians were on hand to take part in this important experiment in European co-operation. The Committee of Ministers met in the sixteenth century Town Hall of Strasbourg, while the Consultative Assembly used the Great Hall of Strasbourg University that had been specially decorated by the City of Strasbourg to lend a fitting touch of dignity to the occasion. The city itself was gaily bedecked with the flags of the Member Nations and was charged with an air of excitement and expectancy. The Delegates to the Assembly, including those of Greece and Turkey, numbered only one hundred and one, but over three hundred and fifty newspaper reporters from all parts of the world were on hand to report the happenings to their readers.

The Committee of Ministers met from August 8 to 13, 1949, to consider the work of the preparatory commission created at the time of the signing of the Statute. This commission had drafted provisional rules of procedure for the Committee of Ministers and Consultative Assembly, elected Edouard Herriot of France Provisional President of the Assembly, and drafted a provisional agenda for the Assembly.

The Committee of Ministers approved a budget for the Council of Europe of 148,000,000 French francs for the period ending December 31, 1949. Member Countries were called upon to contribute roughly in proportion to their population. The largest contributions, 26,400,000 French francs each, were those of France, Italy and the United Kingdom. Turkey, Greece and Iceland were invited to become members of the Council by the Ministers, and the Foreign Ministers of Turkey and Greece took their places on the Committee of Ministers on August 9, 1949.

A rather slender agenda for the Consultative Assembly was approved which was expanded later at the request of the Assembly.[14] There was, at that time, considerable discussion concerning the Committee of Ministers' control over the Assembly's agenda. That issue has since been mooted, however, for the Committee has agreed to allow the Assembly to discuss any questions it chooses within the scope of the Statute.[15] The first session of the

[14] For the official accounts of the first session of the Council of Europe see: Council of Europe, Consultative Assembly, Strasbourg, August 10–September 8, 1949; Secretariat General; Agenda, Orders of the Day, As/OJ/1–18; Minutes of Proceedings As/Pv/1–18; Official Reports 1st–18th Sittings, As/CR 1–18 (Prov.); Reports, Recommendations, etc. Documents Nos. 1–112. For convenience of reference most citations will be to 'Report on the Proceedings of the First Session of the Council of Europe', His Majesty's Stationery Office, Miscellaneous No. 14 (1949), Cmd. 7807, which can be more readily obtained.

[15] See below.

Consultative Assembly, which ran from August 10 to September 9, 1949, was opened with an eloquent speech by Edouard Herriot, the Provisional President, in which he stressed the importance of the success of the Council of Europe where so many earlier attempts had failed. On the following day M. Spaak, formerly Foreign Minister of Belgium, was elected President of the Assembly by a unanimous vote. The Assembly also elected four Vice-Presidents.[16]

Committees were established by the Assembly on Rules of Procedure, General Affairs, Economic Questions, Cultural Questions, and Legal and Administrative Questions. The Economic Committee created Sub-committees for Finance and Currency, Commercial Policy, Industry, Agriculture and Food, and Public Works. The Assembly agreed that an item on the agenda would normally be the subject of a general debate in the Assembly, then be referred to the proper committee for a report to be drawn up. After that there would be further debate on the report in the Assembly with a view towards drafting a resolution. This procedure seemed to work quite satisfactorily during the first session and enabled the Assembly to cover a considerable number of questions in a comparatively short time. England, France, and Italy have three representatives on each committee. The other countries have at least one representative each since arrangements were made for countries with fewer delegates to send substitutes to committee meetings when the regular delegates of the country could not attend in person.

The debates in the Consultative Assembly were moderate, competently spoken and showed an extreme sense of urgency on the part of the representatives in the necessity of doing something to improve Europe's economic and political situation through international co-operation. The debates also show that few practical suggestions as to how this co-operation was to be achieved, and the results that would ensue from it, were put forward in the Assembly.[17]

A number of changes in the Statute of the Council were proposed by the Assembly in its recommendation to the Committee of Ministers.[18] The Assembly wanted the Articles concerning the invitation of countries to join the Council (Articles 4 and 5) changed so that the approval of the Assembly, by a majority vote, would be necessary before an invitation was extended. It also recommended that Article 23 be amended to give the Assembly freedom

[16] M. de Menthon (France), M. Jacini (Italy), M. Kraft (Denmark), Lord Layton (the United Kingdom); Report on the Proceedings of the First Session of the Council of Europe, *op. cit.*, p. 5.

[17] Council of Europe, Official Reports As/Cr 1–18, August 10–September 9, 1949.

[18] Report on the Proceedings of the First Session of the Council of Europe, *op. cit.*, pp. 20–21.

to discuss any matter within the scope of the Council of Europe as defined by the Statute as well as matters referred to it by the Committee of Ministers. The Assembly requested that the present system of substitutes for its Delegates be abolished and instead the number of Delegates be doubled (Articles 25 and 26). Recommendation was made that a second Deputy Secretary-General be added to the Secretariat. One Secretary-General would then be responsible to the Committee of Ministers and the other to the Consultative Assembly (Articles 26 and 27). These recommendations showed a spirit of independence on the part of the Assembly and manifested an ability in the Council for organic growth. The Committee of Ministers when it met in Paris in November to consider the recommendations made by the Assembly decided that because of the practical difficulties involved in securing ratifications to amendments of the Statute it would be best not to change it so soon. However, they met the Assembly's requests to a large measure. The Ministers decided that before they invited a State to become a member of the Council of Europe they would first consult with the Standing Committee of the Assembly. No decision would be taken by the Ministers before the opinion of the Standing Committee had been received. This procedure gives the Assembly a voice in the selection of new Members but no veto power over their selection.

The Committee of Ministers agreed that in fixing the Assembly agenda they would voluntarily forego their right of control so long as the subjects placed on the agenda fell within the scope of the Council of Europe as defined in its Statute. The Ministers concurred with the Assembly that the system of substitutes for Representatives in the Assembly provided for by the Statute was unsatisfactory, but on the other hand they were not willing to double the number of Delegates to the Assembly. It was decided to refer the matter to the Governments of the Members for further examination and to confer with the Standing Committee of the Assembly when proposals had been worked out.

The Committee of Ministers decided to appoint a 'Chief of Administrative Services' for the Consultative Assembly to have the rank of Deputy Secretary-General. This should amply satisfy the needs of the Consultative Assembly for its own representative in the Secretariat.[19] The Committee of Ministers has not sacrificed any of its control over the Assembly by these decisions. On the other hand, the point that it is too soon to amend the Statute in view of the difficulties and delays in getting ratifications is well taken. It

[19] See : *The Times*, November 4, 1949, p. 4; *The New York Times*, November 4, 1949, p. 8; November 5, 1949, p. 2; *The Manchester Guardian*, November 4, 1949.

would seem that short of actually amending the Statute, the Committee of Ministers has done everything in its power to meet the demands of the Assembly. This spirit of co-operation between the Ministers and the Assembly and this facility for organic growth on the part of the Council bode well for its future development.

The role of the Council of Europe in the economic field was discussed at length by the Assembly.[20] The recommendations to the Committee of Ministers on this question emphasised the desirability of spreading information to the people of Europe by all possible means in order to impress upon them the seriousness of the economic peril in which they are living. The Ministers were requested to direct their efforts towards the establishment of a multilateral system of payments, the restoration of inter-convertibility of European currencies, and the creation of permanent machinery for consultation on credit policy. They are urged to develop the work of the O.E.E.C. in liberalising European trade, to take action for the establishment of a European economic union, and to study the development of production in Member Countries in order to meet import requirements as efficiently as possible from their combined resources. The Assembly recommended that studies be made of appropriate action to encourage the free movement of labour and the investment of non-European capital in Member States. The Ministers were requested to extend and develop a system of guaranteed markets, and to call an economic and industrial conference to study the above proposals with the aim of determining means to increase productivity in the interest of Europe. The recommendations call for plans to be submitted by the Ministers at the next session of the Assembly to implement the above recommendations. It is suggested that the Ministers should then nominate a delegation from the Council of Europe to enter negotiations with the United States with a view to modifying existing treaty and tariff arrangements to assist in carrying out these proposals.

The Consultative Assembly decided that the Economic Committee should sit between sessions and make contact with the United Nations Organisation, the Organisation for European Economic Co-operation, and the Bank of International Settlements in order to have the benefit of their advice and assistance. A Sub-committee of Public Works was established to formulate a

[20] For the official agenda see: Report on the First Proceedings of the First Session of the Council of Europe, *op. cit.*, Appendix C, pp. 35–36.

programme of major public works to be carried out collectively by Member States.[21]

The recommendation of the Assembly on the role that the Council of Europe should play in the field of social security stressed the importance of adequate social security to the people and States of Europe and unreservedly adopted the principles laid down by the Universal Declaration of Human Rights [22]:

> 'Everyone has the right to a standard of living adequate for the health and well being of himself and his family, including food, clothing, housing, medical care, and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in circumstances beyond his control.'

All States are urged to continue their efforts to attain an equally high level of social security, to examine the possibility of a general ratification of international conventions of social security within the framework of the Council of Europe. The Assembly commented on the immensity and seriousness of the housing shortage in Europe and advocated that members exchange information on improved techniques and methods of construction to assist in alleviating the crisis. The attention of Member States was drawn to the importance of the problem of the emigration of workers. It was advocated that emigrant workers be granted the same social rights as States granted their own nationals. The Assembly recommended that the convention adopted by the Inter-National Labour Conference in June, 1949, should be ratified as soon as possible by Member States. It was decided that the Committee on Social Questions should continue the study of these problems between sessions of the Assembly.[23]

Methods by which the Council of Europe could develop cultural co-operation and closer collaboration in scientific research and technical development, the third and ninth items on the agenda, were considered together.[24] The Assembly emphasised the importance of the freedom of the individual in the development of European culture. It recommended that the Committee of Ministers establish a system of cultural conventions, take measures to ensure the free circulation and free exchange of cultural works, consider the question of co-operation in scientific research between the Member States and provide practical aid to existing cultural

[21] For the Recommendations of the Assembly on Economic Questions see: *Ibid.*, p. 12.
[22] His Majesty's Stationery Office, United Nations No. 2 (1949), Cmd. 7662.
[23] Report of the Proceedings of the First Session of the Council of Europe, *op. cit.*, pp. 15–17.
[24] *Ibid.*, pp. 22–24.

organisations. The Committee of Ministers was asked to call a meeting of Ministers of Education and University Authorities for the purpose of drawing up a plan for European cultural co-operation, the main points of which were suggested by the Assembly.

A major topic on the Assembly agenda was the consideration of any necessary changes in the political structure of Europe to achieve a greater unity between the Members of the Council of Europe and to make effective European co-operation in the various spheres specified in the Statute.[25] The Assembly announced that it was convinced that the problems of common interest to the States of Europe in the spheres of economic, social, cultural, scientific, legal and administrative matters, could not be solved within the framework of the present European structure. It decided that its Committee on General Affairs should make a study of changes that would be necessary in the Constitutions of Member States and existing international organisations in order that these aims be achieved. The Committee is to make a survey of the effects these changes would have, and of the various proposals under consideration at the present time for achieving these goals. It is to formulate definite and precise proposals for achieving these ends and submit its report to the President of the Assembly in time for the next ordinary session of the Assembly.

The Assembly decided to set up a Standing Committee to carry on its work when it was not in session. The Committee consists of the President of the Assembly, the four Vice-Presidents, and twenty-three Delegates to the Assembly including, *ex officio*, the chairmen of the six regular committees. This Standing Committee is to be convened by the President of the Assembly whenever he considers it necessary, but not less than four times a year. The President of the Assembly, acting on behalf of the Standing Committee, is to consult with the Committee of Ministers as to the advisability of convening an extraordinary session, and on matters arising out of the preceding session. The creation of this committee is an important step for the Assembly and should do much towards giving it continuity of action and increased prestige. The Standing Committee was asked by the Assembly to continue the study of several matters the Assembly had not found time to consider.

The Assembly passed an interesting resolution stating that it considers the aim and goal of the Council of Europe to be the creation of a European political authority with limited functions but real powers. Just what the Assembly intends those functions

[25] *Ibid.*, pp. 18–21.

and powers to be is not clear at the moment, but the report of the General Affairs Committee, mentioned above, should clarify the matter. In the meantime the resolution remains as a source of encouragement to those who aspire to the goal of a United Europe.

Though the question of new admissions to the Council of Europe was not formerly on the agenda, the Assembly discussed it under the heading of necessary changes in the political structure of Europe. The Assembly recommended that before the next session of the Council of Europe the Committee of Ministers should consider the question of new Members of the Council and place this question on the Assembly's agenda.

The maintenance and furtherance of Human Rights and Fundamental Freedoms was the fifth item for discussion on the agenda of the Assembly. The Assembly recommended [26] that the Committee of Ministers cause a draft convention to be drawn up as early as possible for the protection of human rights as set forth in the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations [27] to all persons residing in the territories of members of the Council of Europe. A draft of suggested articles for the proposed convention was submitted to the Committee of Ministers. The observance of these rights is to be ensured by the establishment of a European Court of Justice and a European Commission for Human Rights. The Assembly's recommendation goes on to elaborate the structure, powers, and functions of the Court and the Commission. The Committee of Ministers is asked to report to the Assembly at its next session the steps taken to follow up this recommendation.

The question of creating a common European nationality and a European passport, item six on the Assembly's agenda, was dealt with only hurriedly by the Assembly. A resolution was passed referring the question of a common European nationality to the Standing Committee for study. The Assembly recognised the importance of a common European passport, both in itself and for its importance as a gesture, and recommended that the Committee of Ministers ensure that the matter be studied by the appropriate departments of Member States.[28]

The creation of a European Patents Office was dealt with quite thoroughly by the Assembly. A draft proposal for a convention creating such a Patent Office was drawn up by the Committee of Economic Affairs and approved by the Legal Committee. The

[26] *Ibid.*, pp. 25–28.
[27] See: Footnote 22, *supra.*
[28] *Ibid.*, p. 33.

Assembly transmitted this draft convention to the Committee of Ministers and requested that the Standing Committee of the Assembly be informed at the earliest possible date of any objections the Ministers might have to the putting into effect of the project.[29]

The Assembly approved the formation of a sub-committee of the Committee of Procedure to compile a draft for final Rules of Procedure to be submitted to the Assembly.[30] The Secretariat of the Council was instructed to prepare a full report on the problem of European refugees so that the Assembly might consider the problem at its next session.[31]

The Assembly requested that the Committee of Ministers in making its reports to the Assembly under Article 19 of the Statute be as precise as possible and make clearly defined proposals.[32] As pointed out by the President of the Assembly in his report to the Committee of Ministers this request is the result of the feeling of uncertainty which pervaded the Assembly at the beginning of the session. It was faced with requests for opinions, which because of the short notice given for the convening of the Assembly, it had proved impossible to formulate clearly. These detailed reports, it was thought, would prove a means of encouraging the Member States to co-operate in the work of the Committee of Ministers. It was hoped that the States would be reluctant to have the Committee of Ministers return an inadequate report on a matter it had been asked to act upon to the Assembly where the report would be debated publicly. How effective this optimistic hope of the Assembly will be still remains to be seen.

The Assembly decided that the six committees appointed by it might meet in the interval between sessions. The committees have, with the approval of the Assembly, decided to continue the study of the questions assigned to them. The development of the work of the committees of the Assembly, however, entails expenditures not originally included in the budget approved by the Committee of Ministers. The Assembly asked the Secretary-General to refer to the Committee of Ministers the Assembly's request that with due regard to Articles 24 and 38 (d) of the Statute, the necessary funds be put at the disposal of the committees.[33]

The first session of the Consultative Assembly, after having considered this formidable array of problems, adjourned on September 9, 1949. It had, however, provided for the continuation of its

[29] *Ibid.*, pp. 29–32.
[30] *Ibid.*, p. 22.
[31] *Ibid.*, p. 29.
[32] *Ibid.*, pp. 12, 19.
[33] *Ibid.*, pp. 10, 19.

work in the period before its next session by the creation of its Standing Committee and the decision that its six regular committees might meet during this period.

Results of the First Session of the Council of Europe

The resolutions and recommendations passed by the Consultative Assembly showed commendable industry on its part, but it must be remembered that under the present structure of the Council of Europe, the Assembly is only a deliberative and advisory body. It can formulate and express European public opinion and is a useful organ for bringing the pressure of public opinion to bear on the European Governments, encouraging them, if encouragement be needed, to take steps towards achieving more effective economic and political co-operation between the Western European States. In the final analysis, however, what little executive and administrative power there is in the Council of Europe resides in the Committee of Ministers at the present time. It is by the actions of the Committee of Ministers that the Council of Europe is to be judged. So far, the Committee of Ministers has had very little opportunity to demonstrate what role it is going to play in the process of unifying Europe. At its first session, which lasted only five days, the Committee approved the formal steps necessary for launching the Council of Europe, prepared the way for the first session of the Consultative Assembly, and invited Greece, Iceland and Turkey to become members of the Council of Europe. It then adjourned until November 3 when it met again in Paris to consider the recommendations of the Consultative Assembly. Its second session lasted only three days, time enough to deal with the large number of recommendations of the Assembly in only a superficial manner.[34] The Ministers considered the question of new members in the Council of Europe, as recommended by the Assembly, and expressed itself unanimously in favour of the admission of the German Federal Republic and the Saar as Associate Members of the Council of Europe. A reservation was made in the case of the Saar that this decision is provisional pending a final determination of its status. All the Ministers agreed that Austria should be made a full Member of the Council of Europe as soon as the Austrian Government decided that it could apply for membership without embarrassment to itself. It was felt that Austria might prefer to wait until the settlement of its peace treaty before applying for membership. According to the new procedure the Ministers had adopted at this session it was decided that the opinion of the Standing Committee of the

[34] *The Times*, November 7, 1949, p. 4.

Consultative Assembly should be sought before the final decision on these new Members was taken.

The Ministers referred the Assembly's recommendations in the economic field to the Organisation of European Economic Co-operation for its advice and assistance in carrying out the proposals. Attention was drawn to the necessity for avoiding duplication of work by international organisations in the economic field, and the Secretary-Generals of the Council of Europe and the O.E.E.C. were requested to consult together to avoid overlapping of functions. The Ministers decided to defer taking any decision on the Assembly's recommendation that a delegation from the Council of Europe be sent to confer with the United States Government on the treaty changes necessary in the event that the Assembly's scheme for an Economic Union of Europe and its overseas territories should be established.

Dealing with the cultural recommendations, the Ministers directed that consultations be held with the United Nations Educational, Scientific and Cultural Organisation, the Brussels Treaty Powers, and the Scandinavian Cultural Committee to determine how the most effective action could be taken. The proposals concerning a European Patent Office were referred to the Secretariat of the Council for a report.[35]

The Ministers, while accepting the recommendations of the Council that there should be a European Convention for the protection of Human Rights, did not commit themselves as to its contents. The Secretary-General of the Council of Europe was asked to convoke a conference of experts, preferably eminent jurists, to study the problems involved in such a convention.

Anxious to avoid duplication and wasted effort in the work of international organisations, the Ministers declined to make budgetary provisions for more than three of the committees the Assembly had intended should continue their work between sessions. These three are the General Committee, which is investigating the possible changes in the political structure of Europe, the Standing Committee, and the Committee on Rules and Privileges. Since the Ministers had decided that the opinion of the Standing Committee would be sufficient in the consideration of new Members, the main reason for a special session of the Assembly early in 1950 was removed.[36]

Most of the recommendations of the Assembly having been deferred or referred to groups outside the Council of Europe, the

[35] *The New York Times*, November 5, 1949, p. 2.
[36] *The Times*, November 7, 1949, p. 4.

Ministers adjourned their meeting. They were scheduled to meet again in February, but because of the British elections this meeting was postponed until March.

The Standing Committee of the Consultative Assembly met in Paris on November 7, 1949, for three days to consider the reply of the Committee of Ministers to the recommendations made by the Assembly. The Delegates on the Standing Committee felt that the Committee of Ministers, whether intentionally or not, had weakened the Assembly in the economic field by refusing budgetary provisions for meetings of the Assembly's Economic Committee. The President of the Consultative Assembly said that the Standing Committee would take issue with the Ministers on this matter. Such a committee, he said, would not duplicate the work of other organisations but was necessary to the work of the Assembly in the economic field. General dissatisfaction was expressed by the Standing Committee with the way in which the Assembly's other proposals were handled. However, it was felt that the Ministers' decision that changes in the Statute of the Council of Europe at this early date would be premature was a wise one, and that the Ministers' decision to consult the Standing Committee on the admission of new Members enhanced the Assembly's prestige.[37]

The Standing Committee expressed its approval of the admission of the German Federal Republic and the Saar as Associate Members of the Council of Europe, saying that it was essential to make a place for Germany and Austria in the European framework. It specified, however, that Germany ' should have affirmed its determination to comply with the Terms of the Statute [of the Council] and expressed clearly its will to abide by them '.

The Committee, in defiance of the Ministers, said that it would continue the activities of its Economic Committee despite the lack of budgetary provisions. A meeting of the Committee was called for December in Paris to survey the European economic situation in the light of events since the meeting of the Assembly.[38] Having thus demonstrated again its determination not to be dominated in its work by the Committee of Ministers, the Standing Committee adjourned. There, for the present, matters rest with the Council of Europe.

Possible Future Development

The Council of Europe, in the short time it has been in existence, has demonstrated it has the vitality to become a useful unifying force in Western Europe. It is of great importance that for the

[37] *Ibid.*, November 8, 1949, p. 4; November 9, 1949, p. 4.
[38] *Ibid.*, November 10, 1949, p. 4.

first time in history twelve European States have banded together in a political organ with such broad purposes and aims, and have declared that their avowed purpose is to bring about closer political, economic and social co-operation between themselves. The Council of Europe is, furthermore, a permanent institution.

The Organisation for European Economic Co-operation, it must be remembered, was created for the purpose of administering the aid given to Europe under the European Recovery Programme by the United States. This programme is scheduled to end in 1952 and with its conclusion the raison d'etre of the O.E.E.C. will be gone. The O.E.E.C. may terminate its existence shortly thereafter. The Economic Commission for Europe of the United Nations comprises more countries than the Council of Europe, but is hamstrung in its operations by the political split between the Western European States and Russia and her satellites. The E.C.E. does provide one of the few existing links for trade negotiations between Russia and the West and for that reason will probably have a limited usefulness for some time to come. However, according to Article 19 of its Terms of Reference [39] the work of the Economic Commission for Europe is to be reviewed by the Economic and Social Council of the U.N. in 1951. At this time the decision will be made as to whether or not its work will be continued. An organisation which comprises the Communist States and may be discontinued in a year is certainly not a stable base on which to build towards Western European unity. The structure created by the Brussels Treaty is limited to five States and is predominantly concerned with the questions of military defence of the Member Countries. So it is the Council of Europe, a political organ of general nature that now includes twelve countries and is open to the rest of the Western Democracies, that is the logical base on which European integration and, possibly at some future date, European union should be built.

Though the Council of Europe makes no infringement on the national sovereignties of its Members as it is presently constituted, it does have about the same powers as the O.E.E.C. and the E.C.E. The only powers these organisations have are those of drafting and promulgating general agreements to be adopted by their Member States, making recommendations to Members, and requesting information concerning the action taken in respect to these recommendations. None of these organisations can take any action with respect to a Member State without that State's consent.

[39] U.N., E.C.O.S.O.C., 'Terms of Reference for the Economic Commission for Europe', Document E/CN.10/1 April 3, 1947.

The Council of Europe is empowered by its Statute with the ability to create such sub-committees and commissions as may be necessary to carry on its work. There would be no constitutional objection to its taking over the functions of the O.E.E.C. and the E.C.E. or other European international organisations.

The most important service for implementing European co-operation that could be performed by the Council of Europe at this stage of its existence would be the assimilation and co-ordination of the work of the various European international organisations. This could best be done, indeed would have to be done, under the Committee of Ministers of the Council of Europe. The Consultative Assembly, as has been pointed out, is purely a deliberative and advisory body with no executive powers at all. The remarkable work it accomplished as a result of its first session and the procedural and constitutional changes it brought about were solely directed towards making it a more efficient advisory organ and not towards giving it any executive power.

Before the Committee of Ministers could efficiently undertake this task several changes would be necessary in its organisation. These would not, however, require constitutional changes in the Statute. First, and perhaps most important, if any useful results are to be accomplished the Ministers must arrange to meet more often and devote more time to their work. They should meet, if best results are to be obtained, in continuous session. This, probably impractical for the Foreign Ministers, could be accomplished if the European countries appointed Ministers of Cabinet rank as Ministers for European Affairs. These Ministers could then devote all their time to the problems of increasing European co-operation. It had been suggested at Strasbourg that the importance of the Council of Europe would be enhanced if the Prime Ministers of the Member Countries constituted the Committee of Ministers of the Council, and sent appropriate deputies to the session. It was felt it would be easier to give executive power to a committee representing the Governments through their Prime Ministers than to give such power to a Committee of Foreign Ministers who have no separate responsibility for internal affairs or for the general policy of their Governments. This policy could be carried out by making these Ministers for European Affairs special deputies of the Prime Ministers of the Member States. Such Ministers would come within the terms of Article 14 of the Statute, which states that the Committee of Ministers shall be composed of the Foreign Ministers of the Members or an alternative who shall, if possible, be a member of the Government. A step such as this should not

be a very difficult one to take if the Members of the Council of Europe are truly interested in developing closer European co-operation. This would invoke no constitutional changes in either the Statute of the Council or the Member States. It would be a magnificent gesture on the part of the European States, well calculated to fire the imagination of the peoples and a convincing demonstration of their sincerity and co-operation in striving for European union.

Once arrangements have been made for the Committee of Ministers to meet continuously the way would be clear for gradually increasing their collective responsibility. The Secretariat of the Council could be increased until it takes on the character of a European civil service. Under the direction of, and for the assistance of, the Committee of Ministers it could gradually take over the functions of other international organisations as these are transferred to the Council.

The structure created by the Economic Commission for Europe provides an excellent example as to how the Secretariat could be developed to serve efficiently the Committee of Ministers.[40] Indeed, if the E.C.E. should be discontinued or curtailed by the Economic and Social Council in 1951, its entire staff could well be absorbed by the Council of Europe. The same could be done in the case of the Organisation for European Economic Co-operation when the time comes for its dissolution. It too could be absorbed by the Council of Europe and its co-ordinating work carried on by that body.

The Council of Europe, through its Committee of Ministers, should, of course, establish contact with other existing specialised agencies such as the United Nations Food and Agriculture Organisation, the World Health Organisation, the International Bank for Reconstruction and Development, and the International Labor Organisation. Mr. Myrdal, the Executive Secretary of the Economic Commission for Europe, in a report to that body showed how the work of the E.C.E. had been facilitated by co-operation with these specialised international organisations.[41] The reports of the various committees of the E.C.E. show numerous examples of the truly remarkable practical results that can be obtained through the close co-operation of international organisations. The same co-operation would assist the Committee of Ministers to perform its functions of promoting international agreements and

[40] See U.N., E.C.O.S.O.C., E.C.E., 'Report of Executive Secretary to the Third Session of the Commission', Document E/ECE/73 of April 22, 1948.
[41] See U.N., E.C.O.S.O.C., E.C.E., Document E/ECE/101 of March 31, 1949.

making recommendations to its members more efficiently and effectively.

Should the Member States decide to transfer some executive and administrative power to the Committee of Ministers of the Council of Europe there is much that can be done comparatively simply. There are in existence in Europe today a great many specialised international organisations which operate to co-ordinate segments of the European economy. These organisations have already been approved and supported by the Members of the Council. Transferring their functions to the Council of Europe would involve no new sacrifices of national sovereignty on the part of the European States, and would greatly enhance the prestige and effectiveness of the Council of Europe.

The Central Office for International Transport by Rail, created by the Berne Conventions on Railroad Transport,[42] could operate much more effectively if it were composed of Member States bound together by a pledge to co-operate in all respects for their mutual economic advantage and sharing the same common interests. If its functions were assumed by the Committee of Ministers of the Council of Europe, great strides could be made towards the co-ordination and improvement in transport conditions among the Members of the Council. The Central Office has performed a very useful function during its existence by the arbitration of transport disputes between its members.[43] This function could be continued by the Council of Europe and extended to other forms of European transport.

It is true that many of the Russian satellites are signatories to the Berne Conventions for Railroad Transport and might very well object to such a transfer. However, it is long past the time for the periodic revision called for by these conventions. The Council of Europe could convene a conference for their revision and draw up new conventions for its Member States. The States that did not choose to ratify these new conventions could continue under the provisions of the old ones. There is precedent for this procedure in the practice adopted by earlier railroad conferences when, for example, Spain did not ratify the 1933 Berne Conventions for

[42] International Convention Concerning the Transport of Goods by Rail, and the International Convention Concerning the Transport of Passengers and Baggage by Rail, both signed at Rome, November 23, 1933; 192 League of Nations Treaty Series, pp. 391, 329; Hudson, *International Legislation*, Vol. 6, pp. 527, 568.

[43] For a very thorough account of the successful arbitration by the Central Office, see Hudson and Sohn, *Fifty Years of Arbitration in the Field of International Transport by Rail*, 37 American Journal of International Law, pp. 597 *et seq.*

Railroad Transport and continued to be governed by the 1924 Conventions.[44]

The European States, members of the Council of Europe, could, if they so desired, further extend the Council's authority by having it assimilate the functions and duties of the International Commission for Navigation on the Rhine. This Commission, first created by the Mannheim Convention of 1866 is, at the present time, in operation regulating the commerce on the Rhine.[45] The work of the Commission could be broadened to include other international rivers in the territories of the Member States. The revised Commission should be based on the principles set forth in Article 14 of the statute annexed to the Convention on the Regime of Navigable Waterways of International Concern, signed at Barcelona in 1921, which sets forth the minimum rights and duties that should be held by International River Commissions.[46] The International River Commissions in Europe have done much useful work in the past and could do even more in the future if sponsored by a group of States pledged to co-operate with each other in matters of mutual concern.[47]

The Council of Europe could supplement the work of the Railroad and River Commissions by creating a Central Office for Transport by Road. The activities of these agencies could then be synchronised through an Inland Transport Committee for Western Europe directed by the Committee of Ministers. In this manner the transport system of Western Europe could be systematically improved and co-ordinated for the material benefit of the Member States on a regional basis. These agencies, limited as their power has been in the past due to feelings of national sovereignty, have done much to improve European transport. Assured of the full support of their Member Nations and with their activities properly co-ordinated by a central administrative body they would be able to function more efficiently than ever in the future.

Should the Members of the Council of Europe agree to extending its authority in the field of economics and finance, the Bank of

[44] Hudson, *op. cit.*, pp. 527, 568; for a general review of the work done under the Berne Conventions see: Wedgewood, *International Rail Transport* (1946), and Masters, *International Organisation of European Transport*, International Conciliation, 1937, pp. 501 *et seq.*

[45] For the original convention see Martens, *Nouveau Recueil Général de Traités*, Vol. 20, p. 355. The Commission was reactivated after the Second World War. See: Central Commission for the Rhine, Arrangement providing for participation by the United States of America, effected by an exchange of Notes signed at London, October 4 and 29 and November 5, 1945, Treaties and other International Acts Series 1571 (1947).
pp. 568, 627.

[46] See Hudson, *International Legislation*, Vol. 1, pp. 638, 655.

[47] See Mance, *International River and Canal Transport* (1944).

International Settlements would be of invaluable assistance to them. This bank, which was created for the purpose of expediting the German Reparations payments after the First World War, is endowed with very broad powers by its statute for the purpose of dealing with international monetary activities.[48] These powers take on a contemporary significance in view of the recent agreement between Members of the Organisation for European Economic Co-operation to use the bank in facilitating the Intra-European Payments and Compensations Agreement for the improvement of European trade.[49] This function of the Bank of International Settlements could be broadened and strengthened under the guidance of a comprehensive European organisation. It might in time, with the proper support and encouragement on the part of the Member Nations, assume many of the functions of a Central European Bank.

Contact should be established between the Council of Europe and the International Bank of Reconstruction and Development and the International Monetary Fund for the purpose of determining methods in which the economy of Europe could be strengthened and maintained after the termination of the European Recovery Programme. Both these organisations are empowered to enter into arrangements with international organisations by their Charters. The International Bank for Reconstruction and Development is primarily concerned with long range problems of reconstruction and economic rehabilitation, while the International Monetary Fund was created to deal with short range problems of balance of payment difficulties, exchange stability and the promotion of international trade.[50] The opportunities for improving the effectiveness of these three institutions in their efforts to assist the European economy are immense. The Committee of Ministers might undertake a survey of the general European economy with the assistance of the Bank of International Settlements in search of international projects that could be carried out with the co-operation of the Members of the Council of Europe. The International Bank of Reconstruction and Development could then be called upon to assist in raising the funds for the proposed works. The Committee of Ministers could work on the development of a plan for the free convertibility of its members' currencies to take effect after the

[48] See Article 22, Statute for the Bank of International Settlements, Hudson, *International Legislation*, Vol. 5, p. 314.

[49] See Agreement for Intra-European Payments and Compensation, October 16, 1948, British White Paper, Cmd. 7546, Miscellaneous No. 8, 1948.

[50] See: Articles of Agreement of the International Bank for Reconstruction and Development, Article 1, Treaties and other International Acts Series, No. 1502; Articles of Agreement of the International Monetary Fund, *Ibid.*, No. 1501.

termination of the European Recovery Programme and the Organisation for European Economic Co-operation. The Bank of International Settlements could be used as the central clearance agency, and the International Monetary Fund called upon to assist in the meeting of short range balance of payment difficulties.

The future effect that the International Bank of Reconstruction and Development and the International Monetary Fund may have on the European economy is not to be minimised. Though world wide in scope, both of these institutions were primarily concerned with European problems before the European Recovery Programme began. These problems will probably monopolise the Bank's and Fund's activities after the termination of the E.R.P. because of Europe's importance in the world's economy. The Bank and the Fund have been overshadowed during recent years by the operations of the European Recovery Programme. However, in order to realise the possible future magnitude of their operations it should be noted that the total amount the Bank may loan or underwrite is in the neighbourhood of ten thousand million dollars, while the Fund has at its disposal approximately eight thousand eight hundred million dollars. It may be mentioned for purposes of comparison that the actual outflow of long term capital from the United States to Europe in the period of 1920 to 1929 was eleven thousand two hundred and fifty million dollars.[51] After the transitional period of the European Recovery Programme is over, Europe will still have access to sums larger than she did in the inter-war period for the stabilisation and improvement of her economy. The Committee of Ministers would provide an invaluable service for the improvement of the European economic structure by preparing and implementing plans for the most efficient collective use of these funds by the Members of the Council of Europe on a continental basis.

Agriculture is one of Western Europe's chief industries and is the one making the slowest recovery from the effects of the war. There is a real need for international planning for the rehabilitation of European agriculture on a regional basis. A start has been made by the Food and Agriculture Organisation of the United Nations in the creation of a regional office for Europe using the offices and facilities of the old International Institute for Agriculture at Rome.[52] The Council of Europe, by taking over these functions and using the facilities of this office in co-operation with the Food

[51] Bank of International Settlements, Fifteenth Annual Report, April 1, 1944–March 31, 1945, Basel (1945), p. 117.
[52] *Yearbook of the United Nations*, 1946–47, p. 687.

and Agriculture Organisation, could prepare plans for the implementation of its members for the rehabilitation of European agriculture. The encouraging results produced by the co-operation between the F.A.O., the International Bank of Reconstruction and Development and the Timber Committee of the Economic Commission show how effectively these institutions can work together when properly co-ordinated.[53]

The creation of a European Postal Union has been proposed many times in the last twenty years, and, in fact, was actually begun during the years of German occupation on the Continent. Such regional unions are permitted by Article 5 of the Universal Postal Convention and there are several in existence today in different parts of the world. The Committee of Ministers would do well to initiate the formation of such a union among its members and provide the Secretariat and the necessary facilities for its implementation. The obvious advantages of such a union, in addition to increasing the feeling of European unity among its members, are lower postal rates, improved air mail facilities, better service for parcel post and insured packages and a single stamp for European postal service.[54]

The functions briefly described above, if transferred to the Committee of Ministers of the Council of Europe, would invoke no new sacrifice of national sovereignty on the part of its Member Nations, for these functions are embodied in existing conventions to which they have already agreed, and are being carried on by existing organisations. The effective co-ordination and implementation of them by a single body would, however, greatly facilitate their efficient operation, and at the same time increase the effectiveness of the Council of Europe. The time is now propitious for an effort on the part of the participating nations to harmonise and consolidate the work of the European international agencies.

Such a growth of regional co-operation in Europe would not be incompatible with the spirit of the United Nations Charter which provides for regional arrangements. The Economic and Social Council has itself adopted a regional approach to the solution of economic problems by creating the Economic Commission for Europe and the other regional economic commissions.

[53] An agreement for the increased production of timber in five nations, the increase to be exported to six other nations. The machinery necessary for the increased production was paid for by the Bank, the loan to be repaid on the sale of the timber. See : U.N., E.C.O.S.O.C., E.C.E., Document E/ECE/92 of March 27 1949, pp. 5–6.

[54] See : Mance, *International Road Transport, Postal, Electricity and Miscellaneous Questions*, 1947, pp. 79, 104, 108 *et seq.*

The Council of Europe should, of course, operate in close co-operation with the United Nations as provided for in the Council's Statute. However, in view of the political rivalries that have developed between the Russian Bloc and the Western Powers since the war, it seems clear that any comprehensive regional organisation for closer European co-operation will be developed by the Western Nations alone.

The Council of Europe possesses an inestimable advantage over the United Nations in that it is composed of Member Nations that have manifested a strong desire to co-operate with one another and by and large share the same political and philosophic beliefs characteristic of the Western concept of democracy. This will to co-operate is perhaps the most important single factor in achieving successful European co-operation. The immediate need in Europe is not so much the creation of new international machinery for achieving co-operation as it is of obtaining the best results with the machinery already in existence. Basically the problem is a political one; that of attaining sincere co-operation on the part of all Member Nations. While it is difficult to generalise, a survey of the field of international organisation would seem to indicate that most organisations will succeed regardless of their particular constitutional structure if they receive full co-operation from their members. On the other hand, no matter how carefully the administrative details of the organisation are worked out, or how broad the powers granted to it are, its effective operation can be blocked by non-co-operative Member States. Not infrequently more can be accomplished by intimate friendly relations than by authority based on definite legal provisions. The effectiveness of the Council of Europe will depend, in practice, on the degree of confidence and mutual respect it is able to create among the participating nations. It is by gradually acquiring authority and inspiring confidence that the Council of Europe will best obtain a position enabling it to exert a decisive and useful influence on the economic and political co-operation of the European States.

Should the States decide to transfer a little sovereignty to the Council of Europe the plan proposed by the Consultative Assembly calling for the creation of a European Court of Justice and a European Commission for Human Rights could be adopted and these organs established. The Assembly envisioned the Court and Commission as operating only in the field of human rights and fundamental freedoms. However, it would be of great benefit to the Western European States if their jurisdiction was extended to cover all disputes between Members of the Council of Europe. The Court could deal with legal disputes and the Commission

arbitrate differences of a political nature. The Western European States might more readily submit legal differences and matters calling for conciliation or arbitration to a purely European Court or Arbitral Tribunal when the matters concerned only themselves, than to the International Court of Justice which contains representatives from all over the world. In questions concerning other countries of the world the Members of the Council of Europe would, of course, continue to use the International Court of Justice or the Permanent Court of Arbitration.

The most simple and obvious way to increase the power and importance of the Council of Europe would be to give the Committee of Ministers the power to make decisions by a fixed majority vote and have all members bound by that vote. However, even in an organisation that can do no more than draft general agreements to recommend to its members, the States of Europe refuse to be bound without their consent. Until this fundamental obstacle is overcome there is little point in proposing any sweeping changes in the Council of Europe.

An important contribution to the cause of European unity that can be made by the Council of Europe if the functions of the Committee of Ministers are expanded along the suggested lines would be the creation of a group of European civil servants. The influence of such a group of capable administrators, above national hatred and prejudices and regarding themselves as citizens of Europe, would be most salutary in developing a spirit of mutual trust and co-operation among European nations.

Conclusion

The most important single contribution towards the cause of European unity that could be made by the Council of Europe would be the effective co-ordination and implementation of the work of the many international organisations which now operate in Europe for the co-ordination of significant aspects of the European economy. The progress made by these existing international organisations should be consolidated and established on a firm basis before any attempt is made to go further in the work of unifying Europe. Some of these agencies such as the Organisation for European Economic Co-operation and the Economic Commission for Europe are temporary in character. Their work should be carried on after their activities have terminated. The work could, in any case, be carried on more efficiently under an organisation permanent in character, capable of planning long range programmes confident of the fact that it will remain in existence long enough to see them carried

out. Other organisations are world wide in scope and would gain in effectiveness if regional organisations to perform their functions on a continental basis were implemented by the Council of Europe. Still others, while solely concerned with Europe, operate independently, involving waste and limited effectiveness.

The Council of Europe in its future development would do well to set as its goal the co-ordination and harmonisation of the work of these agencies under a single administrative body for Europe. Under the present constitutional structure of the Council the Committee of Ministers is the logical organ to perform this function. Arrangements would have to be made to have the Ministers meet in continuous or almost continuous session. This could be accomplished easily through a system of deputies for the Foreign Ministers, or, as suggested earlier, by the appointment of special Ministers for European Affairs on the part of the Member States. An adequate well-staffed secretariat should be created to carry out the administrative details of such a programme and provide the Committee of Ministers with technical facilities and information. Policy decisions and political action would be made by the Ministers. A programme such as this would give the Council of Europe real prominence in European affairs. It would invoke little infringement of national sovereignty, so jealously guarded by European States, since all the proposed functions have already been approved by them for other organisations to carry out. This programme would, however, create a body to which national sovereignty and real powers could be transferred gradually over a period of years as the spirit of co-operation and mutual trust among European nations grows and the Council of Europe inspires more confidence in its Members.

One factor is obvious. Adequate financial support for such an organisation is imperative if it is to have the slightest chance of success. No one can say for sure what the cost of organising so large and diverse a continent as Europe will be. It can be said, however, that the sum of one hundred and forty-eight million French francs for an annual budget, less than the cost of a modern long range bomber, is not going to be enough. The three largest contributors to the Council of Europe give approximately the cost of a single fighter plane. Certainly the benefits to be derived from an economically healthy, politically co-operative Western Europe are worth more than that.

A study of the efforts made in the past to achieve European unification leaves one with mingled feelings of encouragement and cynicism; encouragement because of the persistence of these attempts to achieve international co-operation, cynicism because these attempts have for the most part foundered upon the shoals

of nationalistic policies for economic self-sufficiency and unimpaired sovereignty.

Perhaps the present economic crisis in Europe caused by the war's devastation, the disappearance of pre-war sources of revenue from the colonies and overseas investments, the continued adverse balance of payments in respect to world trade, the manifest need for developing European economy on a continental scale to avoid inefficiency, waste and duplication of effort, coupled with the threat of Russian expansion, may provide the requisite incentive to spur the Nations of Europe toward evolving a successful European organisation. The Council of Europe provides the best framework evolved so far to assist in reaching this goal.

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THE PROPER LAW OF A CONTRACT: A REPLY

I. Introductory

Dr. Mann's defence [1] of the view that the proper law of a contract is the law intended by the parties (hereinafter called the subjective theory) and not the law of the country with which the contract has the most substantial connection (hereinafter called the objective theory) is buttressed by arguments which, to some readers at any rate, will seem of varying degrees of weight. The purpose of this article is to suggest that some of his arguments are not so convincing as might at first appear.

Any discussion of this subject must begin with the admission that, so far as dicta are concerned, the authorities are overwhelmingly on the side of Dr. Mann. The subjective theory is the fashionable mode of defining the proper law, and until very recently no judicial voice was raised against it in England.[2] However, this weight of authority need not unduly alarm us, for three reasons. In the first place, it is obvious that the most crucial cases from the point of view under discussion are those in which the parties made an express selection of the proper law. If they made no selection, the court is likely to reach the same result whether it inquires what was the presumed intention of the parties or whether it inquires with what law the contract had the most substantial connection: and the difference between the two theories appears, in such cases, to be merely a difference of approach or formulation and not to be fundamental.[3] Secondly, even if attention is concentrated on the cases where the parties made an express selection, there is, putting aside the arbitration cases (which are admittedly exceptional), not a single case which would have been differently

1 (1950) 3 I.L.Q. 60.

2 'Notwithstanding what was said in *Vita Food Products* v. *Unus Shipping Co.* [1939] A.C. 277, 290, I do not believe that parties are free to stipulate by what law the validity of their contract is to be determined. Their intention is only one of the factors to be taken into account', *per* Denning L.J. in *Boissevain* v. *Weil* [1949] 1 K.B. 482, 490. In Australia the reaction had developed earlier. In *Mynott* v. *Barnard* (1939) 62 Com.L.R. 62, 80, Latham C.J., after citing the *Vita Food Case*, said 'Parties cannot by agreeing that their contract should be governed by the law of a foreign country exclude the operation of a "peremptory" rule otherwise applicable to their transaction'. Compare the remarks of Dixon J. in *McLelland* v. *Trustees Executors and Agency Co., Ltd.* (1936) 55 Com.L.R. 483, 492, cited *post*, p. 199, n. 9.

3 Compare Mann, 3 I.L.Q. 69–70; 72, n. 41; Falconbridge, *Selected Essays in the Conflict of Laws*, 351 (cited *post*, p. 198).

decided if the court had applied the objective theory—not even *Vita Food Products* v. *Unus Shipping Co.*,[4] which Dr. Mann rightly regards as the high-water mark of the subjective theory. Thirdly, the matter is discussed by Dr. Mann and will be discussed in this article as a question of principle, and the emphasis will be on what the judges do rather than on what they say.

II. The Arguments on Principle

(1) Dr. Mann's first argument[5] is that as English courts 'have adopted and guided a practice which prevails all over the world' (with the exception of a few presumably backward American States) it would be a pity to throw doubt on its correctness. One is reminded here of Nussbaum's remark[6] that 'the elaboration of the "proper-law-of-the-contract" doctrine may be counted among the outstanding contributions of English learning to the general theory of Private International Law'. But surely the principle of the autonomy of the will was developed on the continent by Dumoulin and his successors centuries before the subjective theory was formulated by English judges. It is the objective theory, not the subjective, which is indigenous and peculiar to English law. It is here that the difference between what the judges do and what they say is most striking. As Falconbridge has pointed out,[7] 'the rule that the proper law is the law intended by the parties is merely a judicial mode of expressing the rule that the proper law is that of the country with which the transaction has the most real connection'. The judges have in fact looked at the matter objectively and have sought to justify the results by pretending that they were giving effect to the intention of the parties. Nor is this emphasis on objectivity confined to the conflict of laws. Since about the middle of the nineteenth century it can be seen at work in offer and acceptance, where nobody now contends that there must be a meeting of the minds; in mistake, where subjective theories have for the most part been discarded; and in frustration, where results have been reached which clearly bear no relation to what the parties intended. Doubtless other illustrations will occur to anyone familiar with the domestic English law of contracts.

(2) Dr. Mann dismisses almost with contempt the argument that it is impossible to allow parties to choose the law governing their contract without first ascertaining the law permitting their choice:

[4] [1939] A.C. 277; discussed *post*, pp. 201–2.
[5] 3 I.L.Q. 60.
[6] *Principles of Private International Law*, p. 168.
[7] *Selected Essays on the Conflict of Laws*, p. 351.

'it is the private international law of the forum' he says,[8] 'that allows controlling influence to the parties' selection'. But can the argument be so summarily dismissed? Dr. Mann's view seems to assume the very matter in dispute, namely, what the private international law of the forum is. It assumes that the agreement to select a proper law is itself binding as a contract. And it ascribes to the conflict of laws a direct influence on the rights of the parties which properly belongs only to a system of domestic law. A rule of the conflict of laws cannot say that an agreement is valid: it can only say by what law the validity of an agreement is to be governed. A contract is an agreement to which the law annexes an obligation. What law annexes the obligation to the agreement of two Englishmen that their 'contract', made and to be performed in England, shall be governed by the law of Japan?[9] The truth is that the subjective theory cannot be made to work unless we import part of the domestic law of contracts into the conflict of laws in order to determine whether an agreement to select a proper law is binding, just as the American Restatement's place of contracting theory cannot be made to work unless we import part of the 'general law of contracts' into the conflict of laws in order to determine where a contract is made.[10]

(3) Dr. Mann next says[11] that it is idle not to implement the parties' selection of the governing law if the parties are free to select the localising elements which, according to the objective theory, enable the judge to ascertain the centre of gravity of the contract. This, of course, is not a new argument, and it can easily be refuted. One has heard of parties making a journey in order the more easily to get married[12] or divorced.[13] But who has ever heard of business men making a journey (or even appointing agents in a foreign country) solely in order the more easily[14] to make a contract? One doubts whether any such case on evasion of contract law could be produced, even from American jurisdictions where the proper law of a contract is the law of the place of contracting. Moreover, 'the

[8] 3 I.L.Q. 62.

[9] 'How can an English forum be justified in giving any legal effect to the intention of the parties until it has decided by what law efficacy is ascribed to their intentions?', *per* Dixon J. in *McLelland* v. *Trustees Executors and Agency Co., Ltd.* (1936) 55 Com.L.R. 483, 492.

[10] See Restatement, s. 311, Comment *d*; Cook, *Logical and Legal Bases of the Conflict of Laws*, 361–388; Nussbaum, *Principles of Private International Law*, pp. 163–7.

[11] 3 I.L.Q. 63–4.

[12] *E.g.*, *Compton* v. *Bearcroft* (1769) 2 Hagg.Cons. 444; *Simonin* v. *Mallac* (1860) 2 Sw. & Tr. 67; *Galene* v. *Galene* [1939] P. 237.

[13] *E.g.*, *Shaw* v. *Gould* (1868) L.R. 3 H.L. 55; *Williams and Hendrix* v. *North Carolina* (*No. 1*) (1942) 317 U.S. 287; (*No. 2*) (1945) 325 U.S. 226.

[14] Of course legal, not factual, difficulties are being referred to. There is no intention to deny the existence of commercial travellers.

localising elements' include the residence, the domicile, and sometimes even the nationality [15] of the parties. Is it seriously suggested that business men choose to be born in Italy in order that Italian law may govern their contracts? One might just as well argue that because the parties are free to enter into a contract or not as they please (or for that matter to make a will or commit a tort), therefore the law governing contracts, wills and torts is the law intended by the parties.

(4) If the question before the court is whether the parties have reached agreement, it is difficult to see on what principle effect can be given to an express choice of law by the parties. Let us consider the following case. Suppose that you are induced by my fraud to guarantee my bank overdraft under the mistaken impression that you are witnessing some insurance document.[16] The document contains a clause to the effect that this 'contract' is governed by Ruritanian law. When the bank sues you on your guarantee, are you precluded from pleading *non est factum* because by Ruritanian law a party who signs a document is bound by all its terms? Surely not: the reference to Ruritanian law would be rejected because the transaction has no connection whatever with Ruritania. The same reasoning can be applied to the question whether the law annexes an obligation to an agreement admittedly made. Suppose that I promise in writing not under seal to give you £100; and that the writing contains a clause to the effect that this 'contract' is governed by Ruritanian law: could you sue me on my promise on the ground that the doctrine of consideration is not part of Ruritanian law? To this question, it is submitted, there can be only one possible answer. It is idle to say that the English doctrine of consideration is easily evaded by the use of a deed or a peppercorn or a tom-tit. That may be an argument against the doctrine of consideration; but it is no argument in favour of the subjective theory, unless some reason can be advanced for holding that the agreement to make Ruritanian law the proper law is in itself binding as a contract, although there is obviously no consideration for it.[16a]

To judge from their writings and their conversation, adherents of the subjective theory would try to uphold the reference to Ruritanian law in the consideration case, but not in the *non est factum* case discussed above. They would apparently reject the reference to Ruritanian law in the *non est factum* case because by

[15] Dicey, *Conflict of Laws* (6th ed.), p. 590.

[16] Cf. *Carlisle and Cumberland Banking Co.* v. *Bragg* [1911] 1 K.B. 489.

[16a] A useful analogy is provided by *Heyman* v. *Darwins, Ltd.* [1942] A.C. 356, where the House of Lords held that though an arbitration clause in a contract continues to be valid if the contract is discharged by frustration, it would not be valid if the contract is void *ab initio*.

the private international law of the forum the agreement to refer to Ruritanian law is no agreement at all. They are thus compelled to import into the private international law of the forum such doctrines as they choose from the domestic law of contracts or the 'general law of contracts' (call it what you will) and to reject others. Any such discrimination must be purely arbitrary. What justification can there be for importing into the private international law of the forum of a common law country the doctrine of *non est factum*, but not the doctrine of consideration?

III. The Vita Food Case

(1) One must register respectful dissent from Dr. Mann's interpretation of the case of *Vita Food Products* v. *Unus Shipping Co.*[17] His assertion that 'there does not seem to be a single case either in this country or abroad where parties have made a clearly capricious choice'[18] compels him to seek for a substantial connection between English law and the contract in that case. It may be doubted, however, whether he is any more successful than any other commentator on that much-discussed decision. He quotes Lord Wright's statement that 'parties may reasonably desire that the familiar principles of English commercial law should apply'. Why such a desire should be attributed to a New York shipper and a Nova Scotian shipowner the present writer has never been able to fathom. Lord Wright added that the vessel 'though on a Canadian register, is subject to the Imperial statute, the Merchant Shipping Act, 1894, under which the vessel is registered, and the underwriters are likely to be English'. It is difficult to appreciate why a contract for the carriage of goods on board a vessel registered at Halifax, Nova Scotia, should be connected with English law merely because the Canadian Parliament had not re-enacted the English Merchant Shipping Act as part of Canadian law. Moreover, there was no evidence whatsoever that the underwriters were

[17] [1937] A.C. 277. I regret that this is the third occasion on which I have discussed this case, the other two being (1940) 56 L.Q.R. 320 and (1946) 62 L.Q.R. 176–8. I sympathise with those who think that this is at least two occasions too many.

[18] 3 I.L.Q. 64. Elsewhere he says 'In no case have the courts refused to give effect to the parties' express choice of law' (*ibid.*, p. 68). The latter statement is not expressly limited to English cases, but it should be so limited. In the following American cases the court refused to give effect to the parties' express choice of law: *Equitable Life Assurance Society* v. *Clements* (1891) 140 U.S. 226; *American Freehold Land and Mortgage Co.* v. *Jefferson* (1892) 69 Miss. 770; *New York Life Insurance Co.* v. *Cravens* (1900) 178 U.S. 389; *Bundy* v. *Commercial Credit Co.* (1931) 200 N.C. 511; *Gerli & Co.* v. *Cunard S.S. Co.* (1931) 48 F. 115; *Ragsdale* v. *Brotherhood of Railroad Trainmen* (1934) 229 Mo.App. 545; *Owens* v. *Hagenbeck-Wallace Shows Co.* (1937) 192 Atl. 158 (R.I.); *Barndt* v. *Bergenske Dampskibsselskab* (*The Venus*) (1938) 28 Fed.Supp. 815.

English and not American or Canadian; and even if they were, they were not parties and their liability was not in issue. Is every contract for the carriage of goods by sea connected with English law because the underwriters are 'likely to be English'?

(2) Dr. Mann dismisses as lying outside the ambit of his paper 'the much-discussed question whether the construction put by the Privy Council upon the Hague Rules deserves support'.[19] But surely the statements made about the proper law of the contract in the *Vita Food Case* cannot be divorced from their possible repercussions on whether parties can be allowed to contract out of the Hague Rules, though the Rules themselves say they cannot. This is a crucial question: either the parties' selection of English law allows them to evade the Hague Rules prevailing at the port of shipment, or it does not. If it does, the result is mischievous in that it stultifies the patient labours of jurists at the International Conference of Brussels. If it does not, then the selection of English law as the proper law seems to be destitute of any legal consequence whatever. At any rate, no commentator on the *Vita Food Case* has been able to point to a single legal consequence which flowed from the fact that English law was the proper law. The bills of lading were held not to be illegal even by the law of Newfoundland; it was never suggested that they were illegal by any other law; nor, in the events which happened, was it material to determine whether the carrier had succeeded in his attempt to contract out of the Hague Rules, since he was exempt from liability whether the Rules applied or whether they did not.[20] What then was the purpose of the dicta that English law was the proper law of the contract? The answer may best be given in Lord Wright's own words, in the form of a paraphrase of his comments on the dicta in *Sinclair* v. *Brougham*[21]: 'This unnecessary discussion seems to be rather a debating point than the exposition of any juristic conception. . . . Decisions, I repeat, are decisions. Views on [the proper law of a contract] are not decisions. They may form the basis of decisions, though they did not in [the *Vita Food Case*]'.[22]

(3) Dr. Mann rightly rejects Lord Wright's question—begging qualifications on the subjective theory that the intention must be '*bona fide* and legal',[23] and prefers the qualification that it must be reasonable.[24] This is a most important admission. It implies

[19] 3 I.L.Q. 65, n. 16.
[20] 56 L.Q.R. 336–7; cf. Falconbridge, 344, 351.
[21] [1914] A.C. 398.
[22] Lord Wright, *Sinclair* v. *Brougham* (1938) 6 Camb.L.J. 316, 325, reprinted in Lord Wright, *Legal Essays and Addresses*, pp. 18, 32.
[23] It is unnecessary to repeat here what has been said elsewhere about these qualifications: see 56 L.Q.R. 335–337; Falconbridge, 352.
[24] 3 I.L.Q. 66.

that in the last resort the test is objective, which cuts most of the ground away from the subjective theory. Let us return for a moment to the *non est factum* case discussed above.[25] Dr. Mann would apparently say that the mistaken party should be allowed to plead *non est factum*, notwithstanding the reference to Ruritanian law, because it is not reasonable that he should be precluded from doing so. But why is it not reasonable? The answer can only be, because the 'contract' had no substantial connection with Ruritania. The answer cannot be, because the mistaken party did not agree that Ruritanian law should govern, for this reason: by Ruritanian law (which on the subjective theory is the proper law of the contract) that is exactly what he did do, or (more precisely) what he is deemed to have done. It is submitted that no desperate blood transfusion of the domestic law of contracts into the conflict of laws can shake this conclusion.

IV. The Technical Arguments

(1) Dr. Mann next proceeds to examine 'four major reasons of a technical character' which can be adduced in support of the subjective theory.[26] The first is that when the parties have made an express choice, the subjective theory 'achieves one of the law's paramount purposes—it achieves certainty'. Of course one must admit that certainty is one of the paramount purposes of the law. But it may be bought at too high a price; and the question here is simply whether the price is too high. Dr. Mann's objection to the objective theory is that 'in the vast majority of cases the question is one of grade, shade, nuance, of fine distinctions and neat balancing, on which different minds may reach different conclusions'. But this is an objection which might be urged against a good many legal doctrines. We do not shrink from saying that fundamental mistake destroys consent and so prevents the formation of a contract, even though the principles may be difficult to deduce from decided cases. Nor do we hesitate to affirm that if a contract is frustrated by supervening events, both parties are excused from further performance, even though judges are not in agreement as to the juridical basis of the doctrine of frustration. When we have to distinguish between a contract for the sale of goods and a contract for work and labour, we find that justice is better promoted by asking 'what is the essence of the contract?',[27] than by asking 'has the contract resulted in the transfer of property

[25] *Ante*, p. 200.
[26] 3 I.L.Q. 69.
[27] *Robinson* v. *Graves* [1935] 1 K.B. 579.

in a chattel? ',[28] though obviously the latter test is the more certain of the two. Even in the conflict of laws, we find that judges attach very little weight to declarations as to domicile,[29] and no weight at all (in questions of material or essential validity as opposed to questions of construction) to testamentary declarations that a will shall be governed by a certain law. This last example is particularly significant. Freedom of testamentary disposition has been at least as salient a feature of English law as freedom of contract.[30] The law of wills no less than the law of contract exists to implement the intention of the parties. Yet no one maintains that a testator domiciled in England could avoid the impact of the rule against perpetuities merely by stating that his will should be governed by a foreign law.

(2) Dr. Mann's second technical argument[31] is that though the difficulties which he has been discussing are less grave when the parties have not made an express selection, nevertheless it is a relatively difficult matter to ascertain the country with which the contract has the most substantial connection, and a relatively easy matter to ascertain the presumed intention of the parties. His illustration is the very case in which Denning L.J. expressed his approval of the objective theory—*Boissevain* v. *Weil*.[32] Dr. Mann says that 'Monaco would seem to have been the place with which the contract was most intimately connected', but that 'it is reasonable to assume that the parties had English law in mind'. If this is so it seems a strong argument in favour of the objective theory. For the contract was perfectly lawful by Monegasque law, and if that law had been applicable, the plaintiff would have been entitled to recover. Most people would say that he should have recovered, and that the defendant, by invoking the English Defence Regulations, was relying on a shabby and technical defence. However, unfortunately for this argument, it is difficult to agree with Dr. Mann that Monaco was the place with which the contract was most intimately connected. The promise was to repay in England in sterling. The parties used the English language. They were both resident in Monaco involuntarily. The cheques were drawn on an English bank. The borrower was English. True, England was far away and Monaco was surrounded by the enemy. But the loans were made in June and July, 1944, and therefore

[28] *Lee* v. *Griffin* (1861) 1 B. & S. 272.
[29] *Re Annesley* [1926] Ch. 692; *Ross* v. *Ross* [1930] A.C. 1, 6; *Att.-Gen.* v *Yule* (1931) 145 L.T. 9.
[30] The qualification introduced by the Inheritance (Family Provision) Act, 1938, is so half-hearted that it does not affect the present argument.
[31] 3 I.L.Q. 69–71.
[32] [1949] 1 K.B. 482.

after Normandy had been successfully invaded, and at a time when anyone could see that the sands of Hitlerism were running out and that the steam locomotive and the electric telegraph would shortly resume their traditional functions of annihilating distance. In these circumstances, is it not clear that the proper law of the contract was English law, whichever test was applied?

(3) Dr. Mann's third technical argument [33] (to which he evidently does not attach much weight) is that the objective theory would introduce the renvoi doctrine into the private international law of contracts. This is a puzzling argument. No reasons are given as to why this consequence should follow, and no cases are adduced in which it has followed. On the contrary, it is well known that in the *Vita Food Case* (the high-water mark of the subjective theory) Lord Wright, having stated that English law was the proper law of the contract, proceeded to say 'hence English rules *of the conflict of laws* must be applied'.[34] Most commentators agree that this was a *lapsus calami* on Lord Wright's part. It is therefore submitted that the apparition of the renvoi in this connection is a mere phantom, and that if it frightens anybody, it should frighten the advocates of the subjective theory, not those of the objective theory.

(4) The fourth technical argument [35] is that the parties' selection of English law should always be enforced, because English law will be applied if no other is pleaded, and therefore it would be inconsistent to allow the parties to select English law (by silence) in their pleadings, and not to allow them to select English law expressly in their contract. This argument is (it is submitted) more specious than sound. Of course one must admit that if, say, a Californian resident agrees in California to serve a Californian corporation in California, and an action is brought in England, and neither party pleads Californian law, the court will apply English law although the contract is obviously a Californian contract. This was the situation in *Warner Brothers* v. *Nelson*,[36] but that case is not usually regarded as a significant one in the conflict of laws or of great interest to a conflict of laws lawyer. If the contract in that case had contained a clause to the effect that it was to be governed by English law, and if neither party pleaded Californian law, the court would equally have applied English law.[37]

[33] 3 I.L.Q. 71.
[34] [1939] A.C. 277, 291.
[35] 3 I.L.Q. 71–2.
[36] [1937] 1 K.B. 209.
[37] It is worth recalling that the situation in the *Vita Food Case* was similar to the situation in the text, except that the *lex fori* was not the law selected by the parties. For although the parties selected English law as the proper law of the contract, they both pleaded that Newfoundland law was the proper law

But it would be quite unsound to conclude from this either that the subjective theory is the right one, or the more limited proposition that 'an agreement that a contract should be subject to English law should always be enforced'.[38] For both parties were in agreement that English law should be the proper law both at the time of the contract and at the time of the action, and therefore there never was a dispute between them as to what was the proper law. But now suppose that though this Californian contract contained a clause to the effect that it was to be governed by English law, one party wished to plead that it was governed by Californian law: is there any rule of English law, private international or domestic, substantive or procedural, which prevents him from doing so? Of course there is not: he can plead that Californian law governs: and whether his plea will be successful depends not on any rule of English law that foreign law is a question of fact which must be specially pleaded, but simply on the broad question whether the subjective or the objective theory is correct.

(5) Another argument advanced by Dr. Mann[39] is that the objective theory leads to a splitting up of the contract into separate phases, each governed by a different law. It is not clear why the advocates of the subjective theory object so strongly to this splitting, unless it be on the ground that it is more elegant or simpler to have one law governing a contract than several. But this simplicity or elegance may be bought at too high a price. An international contract is a complicated transaction, one which may lead to a great variety of related but distinct questions, and it seems obvious that the function of the conflict of laws is to supply a solution which takes account of the realities of the situation rather than one which can only claim to be juristically elegant or simple. As Dr. Cheshire neatly puts it,[40] 'the inquiry is not—what law governs a contract? It is—what law governs the particular question raised in the instant proceedings?' As he points out, it is obvious that questions such as, Have the parties reached agreement? Have they full capacity? Have the necessary formalities been observed? Is the contract illegal? are quite different from questions relating to the substance of the obligation, and therefore not necessarily governed by the same law. For this reason great merit attaches to

(see 56 L.Q.R. 325). Consequently on the pleadings it was not open to either party to argue, still less for the Privy Council to decide, that English law was the proper law. This remarkable feature of the *Vita Food Case* has been overlooked by many commentators, no doubt because the report in the Law Reports does not set out the pleadings. They have, however, been made available to the present writer.

[38] 3 I.L.Q. 72.

[39] *Ibid.*

[40] *International Contracts*, p. 18.

attempts like those of Dr. Cheshire [41] and Dr. Kahn-Freund [42] to break the problem down into smaller groups. It is significant that both these learned writers arrived independently at a sub-division of their subject-matter which is practically identical; though the law which they would apply to the various phases of the contract is not.

V. Conclusion

The subjective theory was formulated by English judges in an atmosphere permeated by freedom of contract, an ideal which, as Dr. Mann admits,[43] has lost its attraction for many minds.[44] Like many other legal doctrines, it can be explained historically but it cannot be defended logically. Like the theory of implied contract in the law of quasi-contract and the doctrine of the implied term in the law of frustration of contracts, the subjective theory of the proper law is no more than a fiction, at any rate in cases where the question is whether the parties have agreed and in cases where the question is whether their agreement is a contract. However valuable the subjective theory may have been historically in emancipating English courts from a mechanical tendency to apply the *lex loci contractus*, it is submitted that the time has come for it to be discarded. It is strange that Lord Wright, who has taken such a leading part in rejecting the fictions in the law of quasi-contract [45] and frustration,[46] should have lent his authority to the fictitious subjective view of the proper law of a contract. It is to the realistic and iconoclastic tendencies of modern judges like Lord Justice Denning that we must look for a new approach to the problem of the proper law.[47]

J. H C. Morris.[48]

41 *Ibid.*, pp. 51–90.
42 Dicey, *Conflict of Laws*, 6th ed., pp. 616–656.
43 3 I.L.Q. 61.
44 Cf. Lord Justice Denning, *Freedom under the Law*, pp. 67, 69, 70.
45 *Fibrosa* v. *Fairbairn* [1943] A.C. 32, 61–4.
46 *Denny, Mott and Dickson* v. *Fraser* [1944] A.C. 265, 273–6.
47 I am indebted to Mr. C. M. Monteith, Fellow of All Souls College, and Mr. A. R. N. Cross, Fellow of Magdalen College, for valuable help in the preparation of this article.
48 Fellow of Magdalen College, Oxford. All Souls Lecturer in Private International Law.

SOME CONSIDERATIONS UPON THE CONTENT OF A DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND

(1) *The Relation of the Project for a Code to the 'Formulation' of the 'Nürnberg Principles'.*

The General Assembly of the United Nations adopted on November 21, 1947, a resolution (No. 177 (II)), paragraph (b) of which directs the International Law Commission to :

> 'Prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles . . . of international law recognised in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal.' [1]

Any investigation as to what must or should be contained in the code so contemplated must of necessity begin with an appreciation that the direction for its preparation is closely connected with, and is in fact contained in, the same Assembly resolution that instructs the Commission to 'formulate' the principles of international law referred to. The two projects are interconnected. What precisely their inter-relation is, however, is somewhat difficult to determine and depends upon what the General Assembly is to be taken to have meant when, having already, by its resolution No. 95 (I) of December 11, 1946, 'affirmed' the so-called 'Nürnberg principles',[2] it proceeded to direct their 'formulation'. This last problem exercised the minds of the members of the International Law Commission not a little when at their first session they came to approach the task of 'formulation'. They asked themselves, in effect, whether it was possible for the Assembly to 'affirm' undetermined principles, and whether the status of propositions as 'principles of international law' could be questioned once they had been 'affirmed'.[3] And they were forced to the conclusion that they were 'not asked to express an appreciation of the principles applied in the Charter and

[1] *United Nations, Official Records of the Second Session of the General Assembly, Resolutions*, p. 111.

[2] *United Nations, Resolutions adopted by the General Assembly during the Second Part of its First Session*, p. 188.

[3] See United Nations document A/CN.4/SR.17.

the Judgment of the Tribunal at Nürnberg as principles of international law [but] . . . merely to give formulation to those principles without any indication of their authority '.[4] The correctness of the conclusion would seem to be borne out by the *travaux préparatoires*, from which it appears that the original ' affirmation ' of the Nürnberg principles was attended by a direction to the Committee for the Progressive Development of International Law and its Codification (the forerunner of the Commission and the author of the latter's terms of reference) ' to treat as a matter of primary importance plans for the formulation [of these principles] in the context of a general codification of offences against the peace and security of mankind '[5]; and that the term ' formulation ' was used in resolution No. 177 (II) because the original draft thereof, which called for the preparation of the text of a convention embodying the Nürnberg principles, was regarded as ' limiting the Committee [*scil.* the Commission] too much '.[6]

But, if it is thus clear that what is meant by the ' formulation ' of the Nürnberg principles is their incorporation into a draft code of offences against the peace and security of mankind, it is not apparent what else, besides these principles, is to go into the projected code. The history of resolution No. 177 (II) throws little light on this question. In view of the fact that the General Assembly's functions of ' promoting international co-operation in the political field ' and of encouraging the progressive development of international law and its codification ' both spring from the same provision in the Charter, *i.e.*, Article 13 (1) (a), it might be thought the question of offences against peace and security had come to be the concern of the body made responsible for the codification and progressive development of international law because of a decision by the Assembly to treat that provision as a single whole. But this is not the case. ' International political co-operation ' has indeed been interpreted to include the pacific settlement of disputes but the whole topic has become the exclusive province of the Interim Committee and its subordinate organs[7] and so far there has been no co-operation between these bodies and the Commission, which has acquired an exclusive competence in codification and

[4] *Report of International Law Commission covering its First Session, United Nations, General Assembly, Official Records, Fourth Session, Supplement No. 10*, para. 26.
[5] Resolution No. 95 (I), quoted, *supra*.
[6] United Nations document A/C.6/SR.59 (Summary record of the proceedings of the Sixth Committee).
[7] See the (third) report of the Interim Committee, *United Nations, General Assembly, Official Records, Third Session, Supplement No. 10.*

development.[8] The question of a code of offences against peace and security was thrust upon the Commission's forerunner, the Committee for Progressive Development, etc., as a direct result of the raising of the issue of the 'formulation' of the Nürnberg principles in the context of such a code. The item appeared as an incongruous one of substance in the terms of reference of a body whose general concern was solely with procedure—with how the codification and development of international law should be organised. And the Committee considered itself not called upon to do more than recommend its further reference to the Commission, which it was suggested should be set up.[9] There was, however, apparent in the proceedings of the Committee a distinction between (1) the 'draft convention' incorporating the Nürnberg principles which it was recommended that the Commission should draw up [10] (abandoned by the Sixth Committee in favour of a mere 'formulation' of these principles [11]); (2) the 'detailed draft plan of general codification of offences against peace and security, which it was also recommended that the Commission should prepare [12] (for which the Sixth Committee substituted a 'draft code' of such offences [13]); and (3) a code of international penal law, which it was thought the recommended tasks would not preclude the Commission from drafting in due course.[14] But neither the proceedings of the Sixth Committee itself nor the otherwise excellent work done by the Secretariat in pursuance of the instruction in resolution No. 175 (II) of the General Assembly to the Secretary-General 'to do the necessary preparatory work for the beginning of the activity of the International Law Commission, particularly with regard to the questions referred to it by the second session of the General Assembly . . .' [15]

[8] The Interim Committee did indeed draw the attention of the General Assembly to a proposal that the International Law Commission should study the limits of 'domestic jurisdiction': see the report referred to in the preceding note, para. 54. The Commission, for its part, decided not to undertake the codification of the procedure of pacific settlement lest it should merely reduplicate the work of the Interim Committee: see United Nations document A/CN.4/SR.5, pp. 16–18.

[9] *Report of the Committee . . . on Plans for the Formulation of the Nürnberg Charter and Judgment*, *United Nations Official Records of the Second Session of the General Assembly*, *Sixth Committee*, *Summary Records*, *Annex 2*, para. 2.

[10] See in especial, *ibid.*, sub-paragraph (a).

[11] See resolution No. 177 (II), quoted *supra*.

[12] See in especial the report cited in note 9, *supra*, para. 2 (b).

[13] See resolution No. 177 (II), quoted *supra*.

[14] See the report referred to in note 9, *supra*, para. 2.

[15] *United Nations, Official Records of the Second Session of the General Assembly, Resolutions*, p. 110. See the memorandum entitled *The Charter and Judgment of the Nürnberg Tribunal, History and Analysis*, prepared by the Secretariat in accordance with this resolution in connection with resolution No. 177 (II): United Nations document A/CN.4/5 (1949).

makes matters any less obscure than this. The Commission has not as yet done more than have a brief discussion and call for a plan of work with regard to the question.[16]

If the distinction between a draft code of offences against the peace and security of mankind, on the one hand, and a code of international penal law, on the other, be a real one, it is clear that the former must be less extensive than the latter. And the distinction appears acceptable. It is true that there are many so-called international crimes which prove on examination to be no more than crimes of municipal or national law in relation to which the alleged principle of the territoriality of criminal jurisdiction is recognised not to apply. These are perhaps better termed crimes *communis juris*.[17] But it is also true that both within this category of offences as well as possibly outside it, there are crimes which, though they may be designated international crimes in one or another sense of that expression, can hardly be described as offences against peace and security. It is difficult to find an example of such a crime which is not rather an offence *communis juris* than a crime *under* international law. It must therefore suffice, in illustration of the point now made, to say that negligent interference with submarine cables, which is punishable by any signatory to the International Convention for the Protection of Submarine Telegraph Cables of 1884,[18] could hardly be described as an offence against peace and security. On the other hand, it may well be that the 'peace and security of mankind' of which the General Assembly's resolution No. 177 (II) speaks, is something different from, and wider than 'international peace and security', of which the Charter speaks in sundry places, and notably in Article 1 (1), whereby the maintenance of 'international peace and security' is declared to be the first purpose of the United Nations. But this is perhaps doubtful. Peace, like war, is possibly a relation only capable of existence between States. And though the terms 'keeping the peace' and 'breach of the peace' are familiar in the common law, the 'peace' involved is

[16] *Report* (referred to in note 4, *supra*), para. 31.

[17] The whole question of course turns to some extent on the definition of the various categories of offences involved. The 5th edition of Oppenheim's *International Law* defines 'international crimes' as 'Crimes like piracy on the high seas or the slave trade, which either every State can punish on seizure of the criminals, of whatever nationality they may be, or which every State has by the Law of Nations a duty to prevent' (Vol. 1 (1937), § 151). It would appear doubtful, however, whether piracy is a crime *under* international law, or whether by *customary* international law States have a duty to prevent any *distinct category* of crimes. See the *Harvard Draft Convention on Jurisdiction with Respect to Crime* (1935), Articles 9 and 10. And see note 48, *infra*.

[18] Marten's *Nouveau Recueil des Traités*, 2e ser., Vol. 11, p. 281; Article 2. See also the Submarine Telegraph Act, 1885, 48 & 49 Vict. c. 49, s. 1.

not that of individuals, but of the King, or State, or lesser repository of power and jurisdiction. Peace, significantly enough, is not an individual right within the very wide meaning of the Universal Declaration of Human Rights.

(2) *The Nature of the 'Nürnberg Principles'.*

But unless words are meaningless, a draft code of offences against peace and security must consist in something other, and something more, than the mere formulation of the principles of international law 'recognised in the Charter and Judgment of the Nürnberg tribunal'. It will be sought in this paper to suggest what besides these principles is involved. It is necessary first, however, to achieve a general notion as to what these principles are. This question has been already discussed to some extent by the Commission in connection with the determination of the meaning of the word 'formulation'. And any competence to pass upon the extent to which the Nürnberg principles were, in fact, international law having been disclaimed, the process of their formulation, to the extent to which it was carried out at the first session of the Commission, consisted in little more than the paraphrasing of Articles 6 to 8 of the Charter of the Tribunal. This was by no means illogical in so far as 'formulation' was concerned. It is true that, when the process was already well advanced, one member of the Commission, Professor Scelle, protested against it as being 'nothing but an analysis' and as not going any way towards the definition of 'fundamental principles'. He himself offered an alternative draft of such 'principles' as distinct from 'conclusions'. The first of these was 'that the individual was subject to international law, including international penal law'. However, it was objected to the alternative draft that it merely said exactly the same thing in more academic fashion. At this point in the debate the Commission adjourned the whole matter to its next session, appointing a rapporteur to report upon it then.[19] No doubt the rapporteur will be guided by the course of the discussion so far as to what his 'formulation' should be. And, if one thing is clear from the discussion, it is that very little which its Charter lays down concerning the jurisdiction of, and the substantive law to be applied by, the Tribunal will be omitted. For the principal heads of agreement reached by the Commission were as follows: the three categories of crimes against the peace, war crimes and crimes against humanity established by the Charter were to be accepted; that the definition of crimes

[19] United Nations document A/CN.4/SR.28.

against humanity should be widened so as to indicate that such were capable of commission in peace as well as war; that crimes of omission and the criminal responsibility of organisations could alike be ignored; that the principle of the responsibility of individuals for international crimes was a general one; that the Charter needed no clarification as to the exact connotation of a 'war of aggression' or as to what constituted 'planning', 'preparing' or 'waging' such a war; and that war crimes were sufficiently defined as 'violations of the laws of war' and needed no further enumeration or illustration than the Charter provides.[20]

(3) *The Exact Relation of the 'Principles' to the Code.*

These indications of what the Commission understands by the 'Nürnberg principles' raise the question as to whether all these principles can properly find a place in a draft code of offences against peace and security. If the same meaning is to be attributed to the term 'offences against peace and security' as to the term 'crimes against peace'[21] used in the Charter of the Nürnberg Tribunal, this is clearly not so. For crimes against the peace are but one of the three categories of offences over which the Tribunal was given jurisdiction. In the event, the Tribunal had no jurisdiction to convict for any independent offence within one of the two remaining categories—that of crimes against humanity. The wording of the Charter required that any such crime should be committed 'in execution of or in connection with any [*scil.* other] crime within the jurisdiction of the Tribunal', in order that a charge in respect thereof might be entertained.[22] But the Commission has expressed the view that this limitation is undesirable.[23] Therefore, in view of the examples of crimes of this category given in the Charter—such as enslavement of a civil population before or during war—it follows that they, no less than war crimes—of which such examples as ill-treatment of prisoners of war are given—are not necessarily 'crimes against peace'.[24] Indeed the category of the latter in the Charter is very narrow. It is limited to

> 'planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties,

20 United Nations documents A/CN.4/SR.25, 26, 27, 28.

21 As to the history of the concept of 'crimes against peace', see Finch, 'The Nuremberg Trial and International Law', in 41 *American Journal of International Law* (1947), pp. 20–37, esp. pp. 25–9. See also Schwelb, 'Crimes against Humanity', in 23 *British Year Book of International Law* (1946), pp. 178–226.

22 *Treaty Series* No. 27 (1946); Article 6 (c).

23 See pp. 212–3. *supra.*

24 Article 6 (b).

agreements and assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing '.[25]

As this enumeration is introduced by the word ' namely ' it would appear to be exhaustive. And the Tribunal made no effort to widen it, but was content to accept the distinctions drawn in the Indictment between the aggressive *acts* of the accused against Austria and Czechoslovakia, which were not charged as criminal, and the series of aggressive *wars* which began with the attack upon Poland.[26]

It seems likely, in view of the essential unity of the Nürnberg principles and of the interconnection of the plan for their ' formulation ' and that for the preparation of a draft code of offences against peace and security, that all of the three categories of crimes referred to in the Charter of the Tribunal will be construed to be within the rubric of ' offences against peace and security ' for the purposes of the latter project. There is no necessary objection to this. The chaotic state of the so-called laws of war would alone justify the codification of those crimes which consist in their violation. It would, however, be highly regrettable if the interconnection of the two tasks before the Commission and of the very different offences dealt with in the Charter and Judgment of the Tribunal were to be allowed to obscure the true nature of ' offences against peace and security ' and the real range of such offences. Their nature and range are perhaps best demonstrated by an inquiry, not so much into the question whether all that is in the Charter and Judgment ought to go into the draft code, but into that as to what else should go into the latter.

(4) *The Application of the Code.*

The answer depends to some extent on whether the code contemplated is to be *legis latae* or *legis ferendae*. If the code is to enumerate only such offences as are already criminal under international law, at first glance it might seem that there is very little to go in besides the offences referred to in the Nürnberg Charter. Genocide would be an obvious addition.[27] In view of the somewhat

[25] Article 6 (a).

[26] ' The Anschluss, although it was an aggressive act, is not charged as an aggressive war . . .' *Judgment of the International Military Tribunal*, Misc. No. 12 (1946), p. 93. For some comments on this attitude of the Tribunal see Finch, *loc. cit.*, pp. 26–7 and Schick, ' Crimes against Peace ', in 38 *Journal of Criminal Law and Criminology* (1948), pp. 445–65.

[27] See the Convention on the Prevention and Punishment of Genocide, annexed to resolution No. 266 (III) A, *United Nations, Official Records of the Third Session of the General Assembly, Part I, Resolutions*, p. 174.

abortive Conventions of 1937, terrorism might be added.[28] But there the conservative-minded is tempted to stop. To do so, it is apprehended, is to misconceive the whole nature of the task of the Commission in this sphere. Even the conservative-minded will admit, however, that if the code is to be *legis ferendae*, an immense and absorbing vista is opened up and the task of the Commission appears at once to be infinitely grander—and infinitely more difficult. And it is hazarded that, if this great prospect of what the law might ideally be is surveyed, the potentialities of even the existing law as a source of the projected code begin to look considerably more sizeable than might otherwise appear.

As to whether the code is to be of that which is or that which ought to be, there are conflicting indications on the *travaux préparatoires*. The Commission is in general competent for a task of either sort—of ' codification ' or of ' progressive development '. In view of the association of the direction for the preparation of the code with an instruction to the Commission to ' formulate ' principles which the General Assembly had already ' affirmed ', it could be taken that the former was a request for an essay in codification rather than progressive development. But the General Assembly's ' affirmation ' is not necessarily decisive of the character of a proposition as *lex lata*—as the Commission's interpretation of the term ' formulation ' sufficiently shows.[29] And it could be argued on the opposite hand that, having regard to the fact that the ' formulation ' of the Nürnberg principles was previously characterised by the Assembly as a problem ' of primary importance ', the instruction therefor, no less than the ancillary direction for the preparation of the draft code, is to be taken as a ' proposal for the progressive development of international law ' within the meaning of Article 16 of the Commission's Statute.[30] Further indications—in the one direction or the other—are to be extracted from Article 18 (3) of the Statute, and from Resolution No. 260 (III) B of the General Assembly. The former requires the Commission to give ' priority ' to ' requests of the General Assembly to deal with any . . . question '. Concerning it, it may be asked whether the request relating to the draft code is within its scope; whether the circumstance that Article 18 falls within that part of the Statute relating to ' codification ' is relevant; and what weight is to be attached to the proviso in Article 15 that the definitions of ' codification ' and

[28] Convention for the Prevention and Punishment of Terrorism : Hudson, *International Legislation*, Vol. 7, p. 862; Convention for the Creation of an International Criminal Court; *ibid.*, p. 878.

[29] *Supra*, pp. 208–9.

[30] Resolution No. 95 (I), quoted *supra*, p. 208. As to the Commission's Statute, see note 34, *infra*.

' progressive development ', which confine the former to statements *legis latae* and the latter to studies or drafts *legis ferendae*, are adopted merely ' for convenience '. Resolution No. 260 (III) B invites the Commission to study a clearly connected matter—' the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions '.[31] The preamble thereto states that the General Assembly considers that ' in the course of development of the international community, there will be an increasing need for an international judicial organ for the trial of certain crimes under international law '. The Committee for the Progressive Development of International Law, etc., had recorded a similar conviction directly in connection with the matter under discussion and specially drew attention ' to the fact that the implementation of the principles of the Nürnberg Tribunal and its judgment, as well as the punishment of other international crimes which may be recognised as such by international multipartite conventions may render desirable the existence of an international judicial authority to exercise jurisdiction over such crimes '.[32]

What emerges from all this is the certainty that the International Law Commission cannot neglect, in the preparation of the draft code of offences against peace and security, the necessity of so planning that code as to provide for its extension to new categories of crimes, even if in the first instance it is to have only articles relating to offences already generally recognised. Nor need there be any difficulty in this. For, as the Secretariat has suggested, the true intent of the Statute of the Commission is that the character of the work of that body shall not be determined by the necessity of producing such drafts only as are intended to materialise as conventions to be adopted by a considerable number of States.[33] It therefore provides that varying recommendations may be made concerning such drafts as are produced—that no action should be taken upon them, that they should be adopted by resolution of the Assembly only, that they should be commended to States for immediate conclusion as conventions, or that they should be made the basis of negotiation of conventions.[34] In short, the draft code in question may be both *legis latae* and *legis ferendae*.

[31] *United Nations, Official Records of the Third Session of the General Assembly, Part I*, p. 177.

[32] See the Report referred to in note 9, *supra*, para. 3.

[33] See the Secretariat's memorandum entitled *Survey of International Law in Relation to the Work of Codification of the International Law Commission*, United Nations document A/CN.4/1/Rev.1, para. 20.

[34] Cf. Article 23 of the Statute of the Commission annexed to resolution

If it is to contain any element *legis ferendae* a further fundamental question at once arises: is the code which is contemplated to be administered through an international tribunal, through national tribunals, or through both? In connection with this question also there are conflicting indications in the *travaux préparatoires*. On the one hand, it is to be noted that the project of the code is closely connected with the formulation of the Nürnberg principles—principles, that is, governing and expounded in the course of the proceedings of an international tribunal. On the other, it is to be remarked that the suggestion of the Committee for the Progressive Development, etc., of International Law regarding the setting up of an international tribunal for the implementation of the Nürnberg principles, was ignored in connection with the 'formulation' of the latter. But, again, it may be said that the latter suggestion re-appeared in connection with genocide, which is obviously a 'crime against peace and security'.[35] And, equally, it can be argued that the Nürnberg tribunal tended to see the foundation of its jurisdiction in the fact that the signatories to its Charter had 'done together what they might have done singly',[36] so that it was, in effect, the national court of each of them.

There exists perhaps a third possibility: that the projected code is not to be applied at all. But it is thought that an interpretation of the General Assembly's instructions as directions for merely academic study is not lightly to be made. And, even if it be not intended to set up an international criminal tribunal of a permanent character, the susceptibility of the proposed code to application by international tribunals set up *ad hoc*, as were the International Military Tribunals, is not to be neglected. And it may be noted that the alternatives of permanent and *ad hoc* international jurisdiction were exhaustively canvassed whilst the Convention on Genocide was in process of elaboration.[37] That Convention, as well as other precedents, is bound to have influence upon the future of the movement for a permanent international criminal court and, consequently, upon the shape of the projected code. For it may be said that the issue has been to some extent prejudged by the form measures already taken for the repression of international offences have assumed. Although they have never yet been applied,

No. 174 (II); *United Nations, Official Records of the Second Session of the General Assembly, Resolutions*, p. 105.

[35] See p. 213, *supra*.

[36] *Judgment*, p. 38.

[37] For a summary of the discussion see the Secretariat's Memorandum entitled *Historical Survey of the Question of International Criminal Jurisdiction*, United Nations document A/CN.4/7.

both the Genocide Convention [38] and the Convention of 1937 on Terrorism [39] require the contracting parties to erect the offences of which they treat into crimes under national law. They thus contemplate international jurisdiction merely as an alternative [40] and, in the case of genocide,[41] as a rather vague and remote alternative. Similarly, the very fact that the International Military Tribunals were set up for the trial only of major offenders indicates an indorsement by the parties to their Charters of the propriety of national jurisdiction over the vast mass of lesser war crimes.

In the result, the question of the content of the proposed code, considered in relation to the nature of the tribunal which is to apply it, probably resolves itself into a question as to what ought to be omitted if and when the code is applied by an international tribunal, and what omitted when national courts enforce it. The compelling force of precedent apart, it is clear that a code to be applied by an international tribunal ought not to be identical with one applied by national courts. For, on the one hand, there is little point in confiding to an international tribunal jurisdiction over offences *communis juris*—on such few of them as can be held to come within the rubric of offences against peace and security. An international tribunal should in no case be overburdened—and especially not if it is to be a chamber of the (civil) International Court of Justice, as is suggested [42]—nor made to concern itself with crimes of secondary importance, the repression of which is already apparently adequate. And, on the other hand, the view is strongly held amongst penologists that national tribunals cannot either do justice or ensure confidence that justice is done with respect to very many offences of an international flavour. That this is the case is averred most often in connection with war crimes. It is said that accused of the nationality of a vanquished State will even

[38] Article V.

[39] Articles 2 and 3.

[40] See the Convention for the Creation of an International Criminal Court, Article 2.

[41] See Article VI. 'Persons charged with genocide or any of the other acts enumerated in Article III [*i.e.*, associated offences] shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction'. Compare the wording of resolution No. 260 (III) B, set out on p. 215, *supra*. For the history of the provision see the memorandum referred to in note 37, *supra*, pp. 36–55.

[42] The investigation of this alternative by the International Law Commission is requested by resolution No. 260 (III) B, referred to *supra*. A similar suggestion was made many times in relation to the Permanent Court of International Justice. See in particular Bellot's plan in *International Law Association, 33rd Report* (1926), p. 110; and Professor Pella's plan, now reprinted in revised form in *La Guerre—Crime et les Criminels de Guerre* (1946).

be convinced that the ground of conviction is defeat, not guilt.[43] This argument against the entrusting of jurisdiction to national courts would appear to be even more convincing in so far as concerns the other categories of offences referred to in the Charter of the Nürnberg Tribunal—crimes against the peace and crimes against humanity. Ideally, therefore, given the narrower scope of a code of offences against peace and security as compared with that of a comprehensive international penal code, a code of the former variety suitable to be applied by national courts might require to be confined to such few offences *communis juris* as can be said to compromise the peace and security of mankind. The content of a code of international offences to be applied by national courts might, further, be influenced to some extent by whether or not the criminal responsibility of States as such is to be recognised for the future.[44]

(5) *The Positive Definition of Peace and Security.*

Granting a certain degree of mutual exclusiveness between the provisions of a code to be applied by an international tribunal and one for application by national courts, it becomes very necessary to discover something else to be inserted in either or both apart from the Nürnberg principles. For does it not seem that the assignment of major war criminals to an international jurisdiction and of all other offenders, including persons charged with petty war crimes and piracy and the like, to the jurisdiction of national courts constitutes a perfectly adequate division of labour and function and one that does not even call for any further regulation than at present exists? The answer here is thought to be in the negative.

The true situation, it is hazarded, is rather this: The offences enumerated in the Charter of the Nürnberg Tribunal are wholly or mainly offences committed during or in connection with a war. Such offences, or some of them, are certainly offences against peace and security. But they do not exhaust the whole of the latter category by any means. That category also includes, or ought to include, an equal number of offences against peace and security capable of commission in time of peace. Since 'crimes against peace' within the sense of the Charter include the planning and preparation of an aggressive war as well as its conduct, the two classes of offences obviously overlap to some extent. The same must

[43] As to the attitude of neutral States to demands by victims for the surrender of persons accused of war crimes see Lauterpacht, 'The Law of Nations and the Punishment of War Crimes', in 21 *British Year Book of International Law* (1944), pp. 58–95.

[44] On this question see Oppenheim's *International Law*, Vol. 1 (7th ed., 1948), § 156b.

also be the case if the thesis be accepted that a 'crime against humanity' is capable of commission in time of peace as well as in time of war. But, merely to enumerate the offences referred to in the Charter of the Nürnberg Tribunal, is not to tell the whole tale. And in that method of proceeding is involved a dangerous misconception of the nature of peace and security.

This misconception springs from the paradox, no less apparent in the United Nations and its constituent instrument, so admirably explained in Lord Cranbourne's memorandum on the subject of the League of Nations and its lack of universality.[45] Each institution, born, as Madison said of the Constitution of the United States, 'of the grinding necessities of the people', bears or bore unmistakable stigmata of its origin. Each may have been designed to exclude for the future all war; but each, born of war and constituting in its beginnings a continuing victorious alliance, in a sense assumes war to be inevitable and even to be the ultimate guarantee of peace. But this, like another admirable but unsettling quality, is not enough. It is insufficient, in particular in the special regard of the preservation of the peace and security of mankind, to begin and end the process of repression with the enumeration of offences which are either war crimes or connected with the existence of an actual war. Though the Nürnberg Charter indicates the planning and preparation of aggressive war to be an international crime, there is observable, both in that document[46] and in the Judgment of the Tribunal,[47] an unconscious assumption that the test of such acts is the actual outbreak of war. But that is both an unjustifiable and an undesirable assumption.[48] Ideally the

[45] League of Nations document C.367, M.249, 1937, VII.

[46] See in especial Article 6 (c), quoted *supra*, p. 213.

[47] Cf. the following passage: 'The evidence leaves no doubt that von Papen's primary purpose as Minister to Austria was to undermine the Schuschnigg regime and strengthen the Austrian Nazis for the purpose of bringing about Anschluss. . . . But the Charter does not make criminal such offences against political morality, however bad they may be': *Judgment*, p. 120. Cf. also the pronouncement of the International Military Tribunal for the Far East that, no evidence having been offered that Thailand 'had complained of Japan's action as being acts of aggression . . . in these circumstances [the Tribunal was] left without reasonable certainty that the Japanese advance was contrary to the wishes of the Government of Thailand and the charges that the defendants initiated and waged a war of aggression against Thailand remain unproved': *Records of the Proceedings of the International Military Tribunal for the Far East*, Vol. 148, pp. 49, 589.

[48] The view that 'crimes against peace [can] be tried only after a war but not in peacetime. In peacetime it [is] for the Security Council to take action when peace [is] threatened' expressed by the Polish delegate to the Committee for the Progressive Development of International Law, etc. (see United Nations document A/AC.10/SR.19, p. 9) is rather a different one and assumes that offences against peace and security falling short of, or unconnected with, war are not justiciable. See note 17, *supra*. See also Fischer Williams, *Chapters on Current International Law and the League of Nations* (1929), p. 239.

starting-point of the protection of peace must be peace itself, not war. And crimes against peace must be defined by reference not to war but to peace, for the two are not exact antitheses. 'Wars', in the words of one of the few international instruments of the present time to show traces of thought which has developed at all since 1919, 'begin in the minds of men'.[49] To their ultimate origins must the ideal international criminal code go; it may not accept as a definition of peace the mere absence of war.

(6) *The Use of Analogies from National Law.*

But the difficulty is how to go about what may be termed the positive rather than the negative definition of crimes against peace, or offences against the peace and security of mankind. It is certainly insufficient, it is thought, to turn to the Convention on Genocide and to hope to find the answer there. For whether that remarkable instrument adds anything to the Nürnberg principles would seem to be questionable. In any event its scope is remarkably narrow. The answer is to be found, it is rather thought, in turning to the national codes of criminal law, to whose content, the international penologists are accustomed to say, the content of international criminal law should eventually approximate. It is necessary to go to those codes, to examine the heads they contain, and to discover what are the international analogies.

The process is not an easy one. The average national criminal code contains such heads as 'Offences against the State', 'Offences against the Person' and 'Offences against Property', which are not very susceptible of application by analogy.[50] Presumably the national category of 'Offences against the State', comprehending treason, sedition, political or official corruption, and counterfeiting, would have to be reproduced in the international sphere by a category of 'Offences especially directed against the international community' which would inevitably overlap with the analogue of the category of 'Offences against the Person'. For an attack on a single State is of course a matter of concern to the whole international community. However, it is in reality equally true that an offence against the person is an offence against the State: if it were not it would not be characterised as criminal at all.

In view of the sort of difficulty indicated in the preceding paragraph which the search for analogies produces it may be perhaps

[49] Constitution of UNESCO, *Treaty Series* No. 50 (1946), Preamble.

[50] Cf. the French Code Pénal, which contains such cross-headings as 'Crimes et délits contre la chose publique, Crimes et délits contre les particuliers'. These may be compared with such chapter headings in *Russell on Crime* as 'Of Offences against the Security of the State, Of Offences against the Persons, Status, and Reputation of Individuals, Of Offences relating to Trade'.

suggested that a first step required is the categorisation of interests prejudiced by criminal acts in both the national and international spheres.[51] For here there is very little need of analogies : human interests are the same in both spheres. Following some such plan it is possible to arrive very quickly at tentative conclusions. It is clear that the public interest is prejudiced by every act which is characterised as criminal. It is possible that private interests are likewise invariably prejudiced by every such act; though here there may be exceptions. The nature of the interests prejudiced may be either moral or material or both; and there are clearly different sorts of interests within each main class.

By adopting this sort of analysis it would be possible to draw up an international criminal code with headings something like these :—

I. Offences especially prejudicial to the interests of the international community :

(a) Moral Interests	(b) Material Interests
War and the preparation, etc., thereof	
Breach of treaties	Infringement of the freedom of the seas (abetment of piracy, illegal visit, search and seizure, etc.)
Breach of customary international law (especially the laws of war)	Direct attack upon the institutions or agents or instrumentalities of the international community.
Destruction of confidence in the peace (wars of nerves, cold wars, etc.[52])	
Contempt of the Security Council or the International Jurisdiction.	

[51] The titles of Book IV of the Swiss Code Pénal of 1937 are instructive in this connection : Infractions contre la vie et l'intégrité corporelle; Infractions contre le patrimoine; Délits contre l'honneur; Crimes ou délits contre la liberté; Infractions contre les moeurs; Crimes ou délits contre la famille; Crimes ou délits créant au danger collectif; Crimes ou délits contre la sauté publique; Crimes ou délits contre les communications publiques; Fausse monnaie, etc.; Faux dans les titres; Crimes ou délits contre la paix publique; Crimes ou délits contre l'Etat et la défense nationale; Délits contre la volonté populaire; Infractions contre l'autorité publique; Crimes ou délits contre l'administration de la justice; Infractions contre les devoirs de fonction et les devoirs professionels.

[52] See further p. 224, *post*.

II. Offences prejudicing in particular the interests of individual States.

(a) Moral Interests
- Injury to the right to reputation (vilification, etc.)
- Seduction of citizens from their allegiance (incitement to revolt, etc.).

(b) Material Interests
- Injury to the rights to integrity and independence—war, threat of war, abetment of rebellion, intervention, other non-hostile measures such as pacific blockade, embargo, etc.
- Injury to property, seizure of ships, omissions resulting in spread of disease (*e.g.*, foot and mouth)
- Injury to citizens, flagrant denial of human rights
- Injury to economic interests, boycott, economic blockade and other denial of the right of intercourse.

It is not contended that any of the items listed ought to be included in a code of international criminal law in the same fashion as it is here formulated, or that the inclusion of all of them is desirable. It is merely sought to show how far-reaching, and how substantial, an ideal international criminal law can be made to look if an attempt be made to sketch it out in the same style as a national code of criminal law. Or, to put the same thing in another way, it is sought to show that all the ways in which the peace and security of the international community can be prejudiced, are not indicated in the Nürnberg principles, nor yet in the Conventions on Genocide and Terrorism.

(7) *Certain Specific Suggestions.*

It has not escaped notice that many of the proposed offences are acts or omissions in respect of which international claims of a civil nature may, according to existing law, be preferred.[53] But it is thought that a sufficient interim reply to criticism which might be made because of this is that the existence of civil responsibility does not necessarily involve that an act should not be characterised as

[53] As to penal damages in international law, see Oppenheim's *International Law*, 7th ed., Vol. 1, § 156a.

criminal and that what may be termed the civil responsibility of States remains largely an illusion in the absence of compulsory jurisdiction. Further, it will be sought to be shown that the commission of what are now called 'international delinquencies' (*i.e.*, torts or delicts), or even of acts which do not amount to such delinquencies, ought most certainly to be characterised as criminal.

For, though the general scheme outlined above is not thought necessarily capable of defence as to detail, it is apprehended that certainly two, if not three, chapters in addition to a chapter containing the offences detailed in the Charter and Judgment of the Nürnberg Tribunal should go into the projected code. No doubt the addition which would most appeal to the General Assembly is that of a chapter on human rights, worked out in whatsoever detail the ultimate Covenant of Human Rights indicates to be appropriate. That may well be. But it is thought that there are two matters which have claims to inclusion stronger even than human rights.

The first of these is the matter of the destruction of international confidence and the corruption of the popular mind. It is thought that a chapter on what may be termed 'intellectual offences' and comprehending not merely the instigation and conduct of so-called 'cold' or 'white wars' or 'wars of nerves',[54] but also less direct attacks upon the fact and sense of security as incitement to internal revolution, misrepresentation of news[55] and of history,

[54] It is noteworthy that the Polish delegate to the Committee for the Progressive Development of International Law, etc., caused it to be recorded in the Committee's report that in the view of his Government 'propaganda of aggressive wars constitutes a crime under international law and falls under the scope of preparation to such wars as listed in article 6a of the statute of Nuremberg. This crime . . . is a form of psychological armament as opposed to the notion of moral disarmament. The Criminal Code of Poland . . . contains a prohibition of propaganda of wars of aggression. . . . The Polish Government expects that a similar provision will be incorporated into the codification of crimes against peace and security, and requests that the International Law Commission take appropriate action on this matter as one of primary importance. The representatives of Yugoslavia and the Soviet Union associate themselves with this statement'. See the report referred to in note 9, *supra*, paragraph 2, note 1b.

[55] Resolution No. 127 (II) of the General Assembly, the preamble to which recited that it is considered essential in order to develop friendly international relations to facilitate exchange of information and that 'substantial progress in this sphere can be achieved only if measures are taken to combat, within the limits of constitutional procedures, the publication of false or distorted reports likely to injure friendly relations between states', invited Governments to study appropriate measures and to report thereon to the Conference on Freedom of Information, which the Economic and Social Council had convened: *United Nations, Records of the Second Session of the General Assembly, Resolutions*, p. 38. No international agreement on such measures has yet been achieved, the General Assembly considering 'that it is not at present practicable to institute, on the international level, a procedure for verifying the accuracy of a report which might lead to the imposition of penalties for the publication of false or distorted reports'. But, on the thesis that 'to prevent the publication of reports of this nature or to reduce their pernicious effects, it is above all necessary to promote a wide circulation of news and to heighten the sense of

distortion of education,[56] abuse of radio [57] and the like ought to be included.

The second is the question of economic offences. It is not to be denied that recognition of the existence of these, and of their gravity, is growing. A dispassionate estimate of the contribution of the so-called 'white war' against German credit to the rise of Fascism in that country is not perhaps possible even yet. But the view that the sole cause of that phenomenon was the evil genius of the German people is not accepted by everyone. And complaints of economic policies adopted for the gaining of improper political ends have been made in the United Nations.[58, 59] The constitutions of at least two of the specialised agencies contemplate the repression of improper economic practices. For the Charter of the International Trade Organisation lays down an elaborate and far-reaching procedure for the investigation and repression of violation of its principles, one interesting feature of which is that it appears to contemplate a species of arraignment of private commercial enterprises.[60] The Convention on the Inter-Governmental Maritime

responsibility of those regularly engaged in the dissemination of news' and that 'an effective means to these ends is to give states directly affected by a report which they consider false or distorted . . . the possibility of securing commensurate publicity for their corrections' the States negotiating the Draft Convention on the International Transmission of News, which has not, however, yet entered into force, envisage in Articles IX–XI thereof an international right of correction. The ordinary means of exercise of this right is to be the communication of an appropriate statement to the States in whose territories the dispatch complained of has appeared, these States being obliged to transmit such statement to local correspondents and information agencies. In the event of any failure to release a correction the complainant State is to have the right to submit the same to the Secretary-General of the United Nations, and the latter the duty of giving it such publicity as he is able. This scheme, though of high interest, is of limited utility. In particular it applies only in relation to dispatches of correspondents and international news agencies. See also note 57, *infra*.

[56] Compare the Pan-American Convention on the Teaching of History of 1933, Hudson, *International Legislation*, Vol. 6, p. 612; the Convention adopted by the Inter-American Conference concerning Peaceful Orientation of Public Instruction of 1936, *International Conciliation*, No. 328 (1937); the Declaration on the Teaching of History (Revision of School Textbooks), Hudson, *International Legislation*, Vol. 7, p. 850; and see the literature cited in Oppenheim's *International Law*, 7th ed., Vol. 1, p. 252, n. 1; p. 261, n. 1.

[57] Compare the International Convention concerning the Use of Broadcasting in the Cause of Peace, Hudson, *International Legislation*, Vol. 7, p. 409.

[58] As to responsibility for economic boycott see Lauterpacht in 14 *British Year Book of International Law* (1933), pp. 125–40; and see in general Schwarzenberger, 'The Province and Standards of International Economic Law' in this *Quarterly*, Vol. 2 (1948), pp. 402–20.

[59] As to the perhaps startling suggestion of the British delegate to the Preparatory Commission of FAO that the destruction of staple foodstuffs as a measure of price control should be characterised as 'an international crime and banned from use by civilised nations' see Schwarzenberger, 'The Judgment of Nuremberg', in *Year Book of World Affairs*, 1948, pp. 94–124, at pp. 111–12.

[60] Article 46 '1. Each Member shall take appropriate measures and shall co-operate with the Organisation to prevent, on the part of private or public commercial

Consultative Organisation likewise contemplates that in certain circumstances restrictive shipping practices shall be the concern of the organisation it sets up.[61]

For the detailed elaboration of these proposed chapters of the code there would clearly be need for further borrowing from the concepts and procedures of national law. In this connection it is desired to point out two facts. The first is that there has already been such borrowing. The second is that the influence of the common law system upon all branches of international law is, at the present day, both great and growing, so that the principles of penal responsibility which it contains deserve special attention. The force of both these facts is demonstrated by the Charter and Judgment of the Nürnberg Tribunal. For one of the most noteworthy features of the Charter is its importation of the common law concept of conspiracy into international law.[62] And one of the most interesting features of the Trial at Nürnberg was the extent to which it was conducted according to Anglo-Saxon notions of procedure.[63]

No doubt legal systems other than the common law have much to contribute to a system of international criminal law. The principle of the identity of civil and criminal courts and the institutions of *instruction* and the *partie civile* may be mentioned as examples from Continental law.[64] No doubt, too, the relatively

enterprises, business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production of trade and interfere with the achievement of any of the [other objectives set forth in Article 1].

'2. In order that the Organisation may decide in a particular instance whether a practice has or is about to have the effect indicated in paragraph 1, the Members agree, without limiting paragraph 1, that complaints regarding any of the practices listed in paragraph 3 shall be subject to investigation in accordance with the procedures provided for in Articles 48 and 50. . . .

'3. The practices referred to in paragraph 2 are the following: . . .

(c) discriminating against particular enterprises; . . .

(e) preventing by agreement the development or application of technology or invention . . .'.

[61] Article 1. 'The purposes of the Organisation are: . . .

(c) To provide for the consideration by the Organisation of matters concerning unfair restrictive practices by shipping concerns in accordance with Part II . . .'.

Article 4. '. . . where in the opinion of the Organisation, any matter concerning unfair restrictive practices by shipping concerns is incapable of settlement through the normal processes of international shipping business, or has in fact so proved, and provided it shall first have been the subject of direct negotiations between the Members concerned, the Organisation shall, at the request of one of these Members, consider the matter'.

For a comment on this provision, and for the text of the Convention, see 25 *British Year Book of International Law* (1948), pp. 437–57, esp. pp. 439–40.

[62] Article 6. See also the *Judgment* of the Tribunal, pp. 42–4.

[63] Cf. Ferencz, 'Nürnberg Trial Procedure and the Rights of the Accused', 39 *Journal of Criminal Law and Criminology* (1948), pp. 144–51.

[64] See in particular Professor Pella's plan, referred to in note 42, *supra*.

great influence which the common law had upon the Nürnberg Trial is attributable to the fortuitous circumstance that two of the four Sponsoring Powers followed that system in their own courts. Nevertheless, it is difficult to emphasise too strongly the utility of the common law concept of conspiracy in international law. For it is a notion which excludes the necessity for very detailed rules as to complicity or responsibility. And there exists a most instructive precedent for its application for the repression of practices which are unfair or of dangerous tendencies rather than strictly criminal in themselves. This precedent is, of course, the celebrated United States Sherman or 'Anti-Trust' Act, which constitutes a statutory adaptation of the common law conception of conspiracy for the purpose of repressing restrictive or monopolistic trade practices. That Act would merit close study in connection with the elaboration of a code of international economic offences. It would, equally, repay study in connection with the question of the exact range of offences against the peace.

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THE CONTRACTUAL AND RESIDENCE BASES OF NULLITY JURISDICTION—II

(Concluded from p. 27, *ante*)

VI

In the first portion of this paper the opportunity was taken of challenging the propriety of the contractual basis of nullity jurisdiction and of exposing certain inconsistencies which have characterised its application on recent occasions. A scrutiny of the residence basis will, it is suggested, demonstrate with even greater point the inadequacy of the assumed technical premises, interwoven with exploded analytical conceptions respecting the nature of this matrimonial remedy, which from time to time have been preferred to justify the retention of the residence criterion after the eclipse of the ecclesiastical tribunals in 1857.

The fountain-head of authority from which has sprung the continued practice of English courts to adjudicate in suits of nullity on proof solely of the respondent's service within the jurisdiction lies enshrined in section 22 of the Matrimonial Causes Act, 1857, which provided that ' in all suits and proceedings (other than proceedings to dissolve any marriage) the said court shall proceed and act and give relief on principles and rules which in the opinion of the said court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted . . . '. It is common ground that the Consistory Courts from which jurisdiction was transferred to the secular Divorce Court in that year, entertained matrimonial causes on the basis of the respondent's residence within the local jurisdictional area of each particular bishop's court.[1] Their power was thus specifically limited by the so-called Statute of Citations, 1531-2 (23 Hen. 8, c. 9) which laid down that ' no manner of persons shall from henceforth be cited or summoned . . . to appear before any . . . judge spiritual out of the diocese or peculiar jurisdiction where the person . . . shall be inhabiting and dwelling at the time of awarding or giving forth the same citation or summons '. It is essential for the purpose of the succeeding discussion clearly to apprehend the original policy and object of this legislation in order

[1] *Carden* v. *Carden* (1837) 1 Curt. 558.

the more fully to appreciate the characteristic features of the resulting ecclesiastical practice and to assess the subsequent change of function which that practice was made to subserve after the impact of modern notions of jurisdiction on the conflict of laws demanded accommodation in the course of the nineteenth century.

Dr. Lushington described the statute as having been passed 'for the purpose of preventing abuse which took place, by reason of the process to appear in the Arches and other Ecclesiastical Courts being served on a party far from and out of the diocese where the party dwelled'.[2] Restrictive in scope, it both limited the 'venue' of the Consistory Courts and curtailed the original jurisdiction of the Court of Arches, but did not purport to confer additional authority on those tribunals. It is thus amply clear that the residence rule was established for the delimitation of 'internal competence' of the Courts Christian and was not, in origin, directed to 'jurisdiction' in the special connotation attributed to that term in the conflict of laws, *i.e.* as an attribute of territorial sovereignty. As Brett L.J. observed in *Niboyet* v. *Niboyet*,[3] 'cases before the Ecclesiastical Courts did not raise the point of general jurisdiction of the law of the country, but rather a question of procedure within an admitted jurisdiction of such law'. This aspect of their practice is illustrated by such cases as *Williams* v. *Dormer*[4] where jurisdiction in nullity was disclaimed on the ground that the respondent was not within the diocese of the court which had issued the citation. The wife, after obtaining a decree of separation *a mensa et thoro*, changed her residence and proceeded to live in London. She was then sued by her putative husband before the Consistory Court of Canterbury. On appeal to the Arches, it was held that she was not amenable to the jurisdiction of that tribunal as she had acquired the right of living separately from the petitioner and was therefore citable only before the Consistory Court of London. The significance of this decision for the present purpose lies in the fact that the marriage had been contracted in England, which might well have been considered as furnishing a basis of jurisdiction in the international sense in view of the principle which was already tentatively established at that time, that the courts of a foreign locus celebrationis were competent to entertain proceedings so as to entitle their decrees of nullity to recognition in this country.[5]

[2] In *Collett* v. *Collett* (1843) 3 Curt. 726, 729. Cf. also Burn, *Eccl. Law* (1767) 384 ff.
[3] (1878) 4 P.D. 1, 19. *Eodem sensu*, Sir H. Duke in *Eustace* v. *Eustace* [1924] P. 45, 48.
[4] (1852) 2 Rob.Eccl. 505.
[5] See *Sinclair* v. *Sinclair* (1798) 1 Hag.Con. 294.

Similarly, no decision is to be found in the reports in which the Ecclesiastical Courts did sustain a petition in respect of a marriage solemnised in England in the absence of proof that the respondent was cited within the diocese. The first instance of jurisdiction being entertained by an English court on the basis of that criterion alone, unsupported by residence, did not occur until cognisance over those causes had been transferred to the secular Divorce Court,[6] but it is noteworthy that on that occasion the court was neither pressed by, nor adverted to, the argument that its own power was curtailed as the result of the obligatory retention of the restrictive residence rule inherited from its predecessors. Nor is there any evidence that proceedings could have been sustained by virtue of the parties' domicile alone, despite Sir G. Barnes' attempt in *Bater* v. *Bater*,[7] to derive authority for that proposition from Lord Stowell's decision in *Ruding* v. *Smith*.[8] The case for domiciliary jurisdiction prior to 1858 is, in any event, weakened by the reflection that domicile as a jurisdictional concept is of relatively modern growth and seems to have found approbation in the first half of the nineteenth century only on the issue of the extra-territorial validity of *foreign* matrimonial decrees.[9] Moreover, it must be remembered that in Doctors' Commons the term 'domicile' was understood to be synonymous with 'residence' in so far as it was relevant to the scope of jurisdiction of the Consistory Courts. Had the former been acknowledged as susceptible of a special connotation in this connection, such usage would have been not only indefensible, but also inconceivable.

It might have been considered permissible, therefore, to conclude that the residence principle was a rule of 'venue' which was quite distinct from the criteria of international jurisdiction such as had already found, or were in the process of finding, acceptance by the courts of this country in determining the competence of foreign tribunals for the purpose of predicating the validity of their decrees. Some doubts, however, as to the accuracy of that conclusion suggest themselves in the absence of any decision in which jurisdiction was declined in a case where the respondent was resident within the diocese but the marriage had been contracted abroad and, subject to what has been said above, the parties were domiciled in a foreign country. The present writer has been unable to find any ruling in that sense. This

[6] *Simonin* v. *Mallac* (1860) 2 Sw. & Tr. 67.
[7] [1906] P. 209, 220.
[8] (1821) 2 Hag.Con. 371.
[9] See *Warrender* v. *Warrender* (1835) 2 Cl. & F. 488 (divorce); *Connelly* v. *Connelly* (1851) 7 Moo.P.C. 438 (judicial separation), etc.

could conceivably be attributed to an apprehension of the futility of presenting a petition in these circumstances, but there are numerous indications that, in fact, the respondent's residence within the diocese was a *sufficient* basis of jurisdiction irrespective of the presence of foreign elements.[10] This must certainly have been the case prior to the second half of the eighteenth century because it was not until 1752 that it began to be mooted whether the locus celebrationis could claim jurisdictional power on general principles of international law. Moreover, the reports are strikingly reticent with reference to facts which would today be considered essential for the purpose of determining the jurisdictional issue beyond a statement of the respondent's citation within the diocese. Initially, the complete absence of any recognition of the existence of conflict problems was no doubt responsible for this state of affairs, and it is only too likely that this practice ultimately hardened into a conviction that residence had usurped the function of a legitimate criterion of 'jurisdiction'. It thus served the dual role of not only delimiting the competence of individual courts as a rule of venue in the strict sense, but also determined their power of jurisdiction for conflict of law purposes. In this respect, it has found no modern parallel, and it is noteworthy that a recent attempt to predicate a similar function of section 4 of the Summary Jurisdiction Act, 1895, in relation to the power of magistrates' courts to issue separation and maintenance orders, was rightly foiled by the Court of Appeal in *Forsyth* v. *Forsyth*.[11] Nor was this re-interpretation of the time-hallowed residence rule free from objection in other respects. As James L.J. pointed out in *Niboyet* v. *Niboyet*,[12] diocese and 'law district' were not invariably co-terminous, since the Channel Islands were part of the diocese of Winchester and the Isle of Man part of the province of York. In these instances, the residence rule was singularly inappropriate as a basis of jurisdiction in the international sense.

It was inevitable of course that with the transfer of jurisdiction in 1857 the traditional practice of the Courts Christian had to be given a new content, at any rate in the sense of substituting residence in England for residence within the diocese, in order to adapt it to the centralisation of judicature which had been brought about

[10] In *Sinclair* v. *Sinclair* (*supra*), Lord Stowell expressly remarked that the respondent's Scots origin did not 'affect the jurisdiction of (his) Court', in a suit of separation *a mensa et thoro*. Cf. also James L.J. in *Niboyet* v. *Niboyet* (1878) 4 P.D. at p. 4.

[11] [1948] P. 125.

[12] (1878) 4 P.D. 1, 5.

by the Matrimonial Causes Act of that year. The more fundamental question, however, also presented itself whether its continued retention was compatible, and if so in what form, with the re-orientation in the jurisdictional sphere to which the creation of the new court had added increasing impetus. The solution ultimately adopted was to avoid its excision at the cost of once more reshaping its function in circumstances of questionable propriety. As already indicated, section 22 of the Matrimonial Causes Act, 1857, received the interpretation of making it obligatory to follow the residence jurisdiction of the Divorce Court's predecessors. A doubt cannot be repressed whether that provision correctly supports the meaning which has been thus attributed to it. Have the words 'shall proceed and give relief on principles and rules' any reference to the question of jurisdiction at all? Comparison with section 32 of the Judicature Act, 1925, which repealed and re-enacted the earlier section with some modifications, suggests that it should have been interpreted *alio intuito*. It is submitted that its intended purpose was to enjoin the court to adhere to the accredited ecclesiastical rules appertaining to such matters as remedial bars, sincerity and related 'principles' of substantive law and practice. This view finds support not only in the order of appearance of the section in the scheme of the Act but also by the fact that it has been invoked in the suggested sense on numerous occasions.[13] Indeed, it is perhaps significant that the almost identically worded proviso (*b*) to section 1 of the Indian and Colonial Divorce Jurisdiction Act, 1926, is incapable, by reason of its context, of relating to jurisdictional competence.[14] It is conceived that the revision of section 22 by the Judicature Act, 1925, though slightly changing its emphasis to matters of procedure and practice, does not detract from the present contention.

The relation of section 22 to section 42 of the 1857 Act has also received inadequate attention. The latter section authorises service of process outside England and Wales, and therefore contemplates the assumption of jurisdiction over non-resident respondents in suits of nullity as in other matrimonial proceedings. At the outset, it must be emphasised as peculiar that section 22, if it had been designed to relate to jurisdiction, should be found in a part of the Act dealing with substantive law and not placed in apposition to section 42 which has an obvious relevance to the jurisdictional issue. Indeed, as early as 1860, in *Simonin* v. *Mallac*,[15] it was decided that

[13] See, *e.g.*, *Harthan* v. *Harthan* [1948] 2 All E.R. 639, 643; *Fielding* v. *Fielding* (1921) N.Z.L.R. 1069, 1070–1.

[14] The amendment of s. 1 (*b*) by s. 1 (1) (*b*) of the Indian and Colonial Divorce Jurisd. Act, 1940, has made its meaning even more explicit.

[15] (1860) 2 Sw. & Tr. 67, 75.

section 42 supported jurisdiction in all cases where the marriage *de quo* had been celebrated in England notwithstanding the respondent's foreign residence. This ruling marked a clear departure from ecclesiastical practice which, as we have seen, insisted on *exclusive* residence jurisdiction. Thus, it ought, in terms of logical consistency, have precluded the claim for *concurrent* residence jurisdiction which was subsequently advanced upon the pretence of adhering to the ecclesiastical rules by reference to section 22. The function of section 42 was given its correct perspective by Horridge J. in the observation that by it ' this Act of Henry VIII, so far as regards service outside the jurisdiction of the particular Court, has been nullified '.[16] No less forcible was the comment by Sir H. Duke in *Eustace* v. *Eustace* : ' (Section 22) directs the mode in which the jurisdiction shall be exercised. To treat it as limiting the classes of causes with which the Court is to deal is to disregard the effect of the Act as a whole. To treat it as imposing a condition of residence analogous to that of the Statute of Citations is to disregard the terms of section 42 '.[17] The implementation of this construction of the 1857 Act by the admission of the contractual and domiciliary bases of jurisdiction, neutralised by anticipation the effect of section 22 on the present question; but the courts at a later stage, evidently oblivious of the resulting inconsistency and inelegance, purported to resort to it as authority for the recognition of a concurrent and alternative residence basis. The core of this convolution lies in the self-contradictory propositions that, on the one hand, section 22 does not compel compliance with the restrictive residence rule by reason of the wide terms of section 42, and that, on the other, that same section renders a continuation of the old practice obligatory. Their patent incompatibility, however, has been partially concealed by ascribing to section 22 the function of creating a novel residence basis of jurisdiction deprived of its previously exclusive character. In view of these considerations, who can gainsay that it is little better than a subversion of logic both to approbate the residence rule on the ground that the practice of the ecclesiastical tribunals is still obligatory on the courts after 1857, and at the same time to depart from the inherited formula so as to concede concurrent competence on alternative bases?

In fact, it was not until 1902 that the ecclesiastical tradition was revived in *Roberts* v. *Brennan*.[18] During the latter half of the nineteenth century the locus celebrationis had gained an ascendancy

[16] In *Graham* v. *Graham* [1923] P. 31, 35.
[17] [1924] P. 45, 51.
[18] [1902] P. 143.

which might well have justified the belief that jurisdictional competence in nullity suits had been subjected to tacit reconsideration and that the death-knell of the residence basis had tolled in 1857. Nevertheless, that rule had been kept alive by the Divorce Court in relation to the remedies of judicial separation and restitution of conjugal rights in connection with which the above-mentioned interpretation of the 1857 Act had primarily been evolved in the intervening years. The practice in those proceedings, however, had been placed upon a firmer foundation by resort to the secondary argument that they were actions in personam, so that in effect the ecclesiastical tradition merged in the rules of jurisdiction appropriate to that general category of proceedings. But in view of the subsequent decision in *Salvesen's Case*, that buttress was not available in relation to nullity suits, though the repeated, but ill-founded, references to section 22 could not fail to remind the court of this last straw for the purpose of affording a semblance of authority to implement the undoubted desire of grasping cognisance of nullity petitions on as wide a platform as possible. Sir F. Jeune's well-known statement that residence, not domicile, constituted the jurisdictional test, is the last link with ecclesiastical practice the pertinence of which had already been negatived in *Simonin* v. *Mallac*. It was doomed after *Salvesen's Case* and emphatically discarded in *De Reneville* v. *De Reneville*.[19]

In 1937 a new opportunity presented itself for a clearer analysis of the rule than had been vouchsafed by Lord St. Helier in the earlier case. In *White* v. *White*[20] Bucknill J. granted a decree, although the alleged marriage had taken place in Melbourne and the respondent was both domiciled and resident abroad. Instead of confining himself to a reiteration of the statutory basis of the residence rule, he ventured to advance the view that jurisdiction in nullity was in personam, for which postulate he sought support in the consideration that the ecclesiastical courts had consistently adhered to the practice of assuming jurisdiction on proof of the respondent's residence within the diocese. That argument, with great respect, contains a substantial flaw. An action is not in personam because, in order to sustain the proceedings, the defendant must be before the court. Rather may we say that, if for analytical reasons a suit is deemed to be in personam, the respondent's submission, appearance or residence is essential to render the court jurisdictionally competent. Bucknill J.'s attempt to substantiate his assertion by reference to an obsolete statement in

[19] [1948] P. 100.
[20] [1937] P. 111.

Shelford's treatise [21] is open to serious objection in view of the unambiguous pronouncement by the House of Lords in *Salvesen's Case* that proceedings in nullity are in rem. The point taken here is not one of mere academic interest, because on it depends the solution to the questions whether, for example, constructive submission would found jurisdiction and whether a foreign decree granted by the court of a country with which the respondent was not connected otherwise than by residence is entitled to recognition in this country. If the true authority of residence jurisdiction is found in the enabling provision of section 22 of the 1857 Act, as subsequently re-enacted, coupled with the rule derived from the Statute of Citations, a negative answer is inevitable, whereas if it were deemed to derive from principles of international law of general application, an argument in favour of an affirmative conclusion to such inquiry could be sustained.

In any event, the circumstances of the case of *White* v. *White* militated against the assumption of jurisdiction on the alleged residence basis because the respondent was not in England at the time of service.[22] Thus Bucknill J., while purporting to proceed on the misplaced in personam theory, exercised jurisdiction in blatant disregard of its requirements.[23] He felt, however, constrained to admit that he 'should have had serious doubts whether the court had jurisdiction over the matter' if the respondent had disputed the court's competence, but was of the opinion that the latter had, by conduct and admissions, so acted as to justify the court in granting the decree. This argument in extremis has been effectively repudiated by a learned Canadian judge in these words: 'His Lordship seems by inference to take the view that a respondent outside the jurisdiction must, in order to take away the jurisdiction of the court in which the action was instituted, enter an appearance and protest against the jurisdiction of the court. To my mind, the contrary is the case. The failure to enter an appearance and accept the jurisdiction of the court is simply ignoring a process of the court which the respondent knows has no jurisdiction over him'.[24] Against this criticism it may be urged that it was the practice of the ecclesiastical courts to proceed with a suit if the party cited was not in fact resident within the diocese but failed to take the point of jurisdiction.[25] It is notable, however, that in the subsequent case of

[21] *Law of Marriage and Divorce* (1841 ed.), p. 486.
[22] Jurisdiction was, however, presumably justified by reason of the petitioner's English domicile.
[23] Cf. Read, *Recognition of Judgments*, p. 242.
[24] *Per* Farris C.J. in *Shaw* v. *Shaw* [1945] 1 D.L.R. 413, 415–6.
[25] See Pilcher J. in *Sim* v. *Sim* [1944] P. 87, 91.

Hutter v. *Hutter*[26] Pilcher J. invited the King's Proctor to argue the issue, which procedure is inconsistent with the contention that the matter could ordinarily go by default, and we must recall that, as the result of the decision in *Herd* v. *Herd*,[27] it is now taken as established that failure to contest jurisdiction does not exonerate a deserted wife from affirmatively proving the husband's continued domicile in England. Moreover, the matter would be advanced little further by construing the respondent's failure as an implied submission to the jurisdiction of the English court, since it is generally admitted that this factor cannot confer competence in actions in rem. This would appear to be so, at any rate, in matrimonial proceedings impinging upon status, such as dissolution,[28] and ought to apply to suits of nullity which, in view of the decision in *Salvesen's Case*, must be regarded as falling within the same juridical category of actions. It is in this respect that Bucknill J.'s premise, *viz.*, that nullity suits were in personam, was liable to lead to erroneous conclusions. The matter was recently put beyond controversy by Lord Greene M.R., who stated that 'on principle, the exercise of jurisdiction in matrimonial causes affecting status could not depend on the submission of the respondent'.[29]

In the well-known cases of *Easterbrook*[30] and *Hutter*[31] decrees were granted on the ground of the respondents' wilful refusal to consummate, in reliance both on the parties' residence in England and the fact that the marriages had been contracted in this country. The additional references to the respondents' domicile within the jurisdiction must now be discountenanced in view of the ruling by the Court of Appeal in *De Reneville* v. *De Reneville*[32] that the putative husband's domicile becomes that of his de facto wife as the result of a voidable, as distinct from a void, marriage. With reference to the residence basis, Pilcher J. in the latter case expressly professed to be bound by the Matrimonial Causes Act, 1857, and the long practice of the court, notwithstanding the status principle of nullity enunciated by the Lords in *Salvesen's Case*. The judgments, however, in neither case contain an unambiguous affirmation of the residence practice. Both suggest alternative bases, and certain of Pilcher J.'s observations imply a restriction of residence jurisdiction to cases where the marriage had also been

[26] [1944] P. 95.
[27] [1936] P. 205; subject now, of course, to s. 13 of the Matrimonial Causes Act, 1937.
[28] *Armitage* v. *Att.-Gen.* [1906] P. 135.
[29] *De Reneville* v. *De Reneville* [1948] P. 100, 113. Thus also *Gagen* v. *Gagen* [1929] N.Z.L.R. 177, 186.
[30] [1944] P. 10.
[31] [1944] P. 95.
[32] [1948] P. 100.

contracted in England. His judgment evinces a strong reluctance to subscribe to an unqualified affirmation of the residence rule and yields little more than an acceptance of the competence of the locus celebrationis. At the same time, it would appear that there is no longer room for confining the latter to cases where the respondent is also resident within the jurisdiction. The restrictive interpretation of the residence requirement has been discarded in too long a line of decisions, both in relation to jurisdiction based on domicile and locus celebrationis, to permit of revival at the present stage.

The attempt by Barnard J. in *Robert* v. *Robert* [33] to transcend the traditional limits of the residence test by sustaining jurisdiction on the basis of the *petitioner's* residence alone met with emphatic rejection at the hands of the Court of Appeal in *De Reneville* v. *De Reneville*. Thus, at any rate, were dispelled the grave implications which the gradual departure from the accepted interpretation of that jurisdictional test in such cases as *Roberts* v. *Brennan* and *White* v. *White* had foreshadowed. At the same time, Lord Greene M.R. reserved for future consideration whether the residence of both parties could be sustained as a legitimate jurisdictional criterion, a question which had been purposely left open by the Lords in *Salvesen's Case*. The absence of any indorsement of this basis on an appellate level gives scope for the hope that its archaic character and inadequate premises may yet lead to its rejection in the future.

The residence basis of jurisdiction in nullity has not been accepted either in the United States or Scotland. Since its position in English law could be justified only by reference to statutory authority and not by reliance on general principles of international validity, its repudiation in those countries need not occasion surprise. In most law districts of the British Commonwealth, however, the relevant section of the Matrimonial Causes Act of 1857 or analogous provisions are in force and have received the same interpretation as in England. This conclusion was reached after an exhaustive examination of the pertinent authorities in the Northern Irish case of *Mason* v. *Mason* [34] and has been applied in Manitoba,[35] Saskatchewan,[36] British Columbia,[37] Victoria,[38]

[33] [1947] P. 164.
[34] [1944] N.Ir. 134.
[35] *Hutchings* v. *Hutchings* (1930) 39 Man.R. 66 (absolute nullity).
[36] *G.* v. *G.* (1928) 22 Sask. 376 (absolute nullity); *Reid* v. *Francis* (1929) 24 Sask. 1 (voidability).
[37] *Purdy* v. *Purdy* (1919) 27 Br.C.R. 248 (absolute nullity); see also *Shaw* v. *Shaw* [1946] 1 D.L.R. 168 (voidability), *semble Gower* v. *Starrett* [1948] 2 D.L.R. 853.
[38] *Corbett* v. *Adamson* (1894), 20 Vict.L.R. 278 (absolute nullity).

New South Wales[39] and New Zealand.[40] In Australia, the Matrimonial Causes Act (Cth), 1945, has additionally conferred jurisdiction in all suits of nullity on the courts of the State in which the *petitioner* has been resident for a minimum period of one year, provided he or she is domiciled within the Commonwealth.

An additional reference to the controversial distinction between void and voidable marriages cannot be omitted. It is unnecessary to repeat the arguments which to the present writer appear to militate against the soundness of any differentiation between the respective proceedings for jurisdictional purposes. With reference to the residence test, however, an additional obstacle to the principle in *Inverclyde* v. *Inverclyde*[41] looms large. The residence basis can be justified, if at all, only by reason of the assumed statutory compulsion to continue the inherited practice of the Consistory Courts. It is indisputable that nullity proceedings on allegations of voidability were within the cognisance of those tribunals which, as has been shown, acknowledged residence as the exclusive jurisdictional test. Despite the absence of any reported decision explanatory of the practice prior to 1858, which was commented on in *Inverclyde* v. *Inverclyde*, it is futile to maintain that the ecclesiastical tribunals might in fact have adopted an exclusive domiciliary basis. Bateson J. in truth conceded this point,[42] but failed to pursue the implication that adherence to the customary interpretation of section 22 of the 1857 Act destroyed the legal basis of his differentiation between the respective proceedings. Judicial opinion on this question is as yet divided. Though Lord Greene and Bucknill L.J. in the *De Reneville Case* intimated their approval of the reasoning in *Inverclyde* v. *Inverclyde*, they preferred to leave the propriety of residence jurisdiction in respect of voidable marriages to renewed consideration.[43] It is notable, however, that the Master of the Rolls explained the case of *Hutter* as having been decided by reference to the residence of both parties within the jurisdiction, without subjecting that aspect of the decision to adverse criticism, and more recently Lord Merriman observed in *Harthan* v. *Harthan*,[44] 'that the Court of Appeal assumed in *De Reneville* v. *De Reneville* that the residence of both parties, as distinct from domicil, might be sufficient to

[39] See *Smart* v. *Maxwell* (1930) 47 N.S.W.W.N. 100 (absolute nullity).
[40] *Wilson* v. *Bennett* (1906) 26 N.Z.L.R. 112 (absolute nullity); see also *Gagen* v. *Gagen* (*supra*).
[41] [1931] P. 29.
[42] *Ibid.*, at pp. 45–6.
[43] [1948] P. 100, 116, 123.
[44] [1949] P. 115, 145.

found jurisdiction' in these cases. The judgments in *Casey* v. *Casey* [45] have not advanced the solution of this question.

In conclusion, the following observations are ventured with a view to underlining some of the difficulties which have been experienced by English courts in their quest for a satisfactory basis of nullity jurisdiction. Such exposition may incidentally contribute towards a simplification of the problems involved and suggest their solution. Three obstacles to the evolution of a universally acceptable principle deserve consideration :

(1) In contrast to the Canon law and most Continental legal systems, English law does not insist on the necessity of a judicial sentence of nullity, except in the case of voidable marriages. Invalidity may be assumed without aid of a specific decree pronounced by a court of law, and it is well-founded prudence only which may induce the parties to seek an unequivocal and final judicial declaration. The question has been asked, How can a court refuse to entertain a petition for lack of jurisdiction, if the invalidity of the marriage need not be judicially established at all? Such principle would be a *brutum fulmen*, being devoid of an adequate sanction to enforce compliance with judicial practice. Considered from another point of view, it is arguable that refusal to sustain proceedings or to recognise a foreign decree cannot validate a marriage which is invalid ab initio. Common sense provides the answer to this apparent dilemma. The historic accident which is responsible for this peculiar feature of English law cannot be allowed to influence the development of conflict rules whose avowed purpose it is to provide universally applicable criteria capable of passing the test of adequacy in all conflict situations. Moreover, it is an indisputable fact that parties but rarely shelter themselves behind the assumed invalidity of their marriage without seeking a specific declaration of invalidity. The issue of nullity *vel non* is usually dependent on the elucidation of difficult questions of law which, particularly when burdened with the complications inherent in most conflict situations, make resort to a court of law a virtually inescapable necessity.

(2) As a corollary of the principle that a specific decree of nullity is not required to establish the invalidity of a 'void' marriage, the issue may frequently be raised incidentally, *e.g.*, in criminal prosecutions for bigamy,[46] in petitions under the

[45] [1949] 2 All E.R. 110: see particularly at p. 115.
[46] See *R.* v. *Naguib* [1917] 1 K.B. 359.

Legitimacy Acts,[47] in succession suits,[48] or in proceedings for divorce, judicial separation,[49] restitution of conjugal rights,[50] or jactitation of marriage.[51] It is certain, however, that the incidental determination of nullity in proceedings other than on petition for nullity does not result in a decree in rem, entitled to universal recognition in other jurisdictions, as the court in these circumstances does not purport to render a decree of status.[52] Similarly, an incidental affirmation of the validity of a marriage is governed by the same considerations. From this follows the consequence that, in order to render a decree in rem, the court must be jurisdictionally competent to pronounce upon the status of the parties. It has been suggested, however, that a *specific* determination of nullity by a court which is competent only to adjudicate in personam may not be without legal effect, and would at any rate be binding inter partes.[53]

In many cases, such as *Ogden* v. *Ogden*,[54] this qualification would constitute a serious limitation, since the decree would be of no avail to and against third parties. In any event, some doubt as to the correctness of the cited proposition may be raised, because a decree is entitled to recognition only on proof of jurisdictional competence. As a specific decree of nullity is an adjudication in rem, it is questionable whether it is feasible to supplement lack of jurisdiction by the contention that, if rendered on an in personam basis, the decree may be valid for limited purposes inter partes.

(3) It is a basic principle of the Canon law that a decree of nullity is merely declaratory and does not profess to affect rights and status. Being simply the best opinion on the facts placed before the court, it lacks both finality and authority of res judicata.[55] It has been claimed that this principle was retained by the English ecclesiastical tribunals after the Reformation and

[47] *Armitage* v. *Att.-Gen.* [1906] P. 135.
[48] *Shaw* v. *Gould* (1868) L.R. 3 H.L. 55; *Re Bethell* (1887) 38 Ch.D. 220; *Re Paine* [1940] Ch. 46, etc.
[49] *Chetti* v. *Chetti* [1907] P. 67; *Nachimson* v. *Nachimson* [1930] P. 217.
[50] *Scrimshire* v. *Scrimshire* (1752) 2 Hag.Con. 395; *Darymple* v. *Darymple* (1811) 2 Hag.Con. 54; *Countess de Gasquet's Case* [1914] P. 53.
[51] *Goldstone* v. *Goldstone* (1922) 38 T.L.R. 403.
[52] This distinction between incidental and specific determinations of nullity should provide the answer to J. H. C. Morris' apprehensions of the apparent futility of insisting on jurisdictional requirements. See note in 61 L.Q.R. 343–4, Dicey (6th ed.), pp. 252–3. The pertinent principle was clearly stated by Lord Penzance in *P.* v. *S.* (1868) 37 L.J.P. 80, 81.
[53] See *Salvesen's Case* [1927] A.C. 641, *per* Lord Haldane at pp. 655–6, and Lord Phillimore at p. 670; similarly Sir H. Duke in *Mitford* v. *Mitford* [1923] P. 130, 135–6.
[54] [1908] P. 46, where a French decree was relied upon by the wife against her second husband. Likewise, in *Salvesen's Case* the invalidity of the Wiesbaden judgment was questioned by the Administrator of Austrian Property.
[55] See Sheed, *Law of Nullity*.

continued as an integral feature of our matrimonial law. Thus Shelford stated that ' a sentence touching the validity of a marriage never becomes a final judgment but is always open to revision or reversal '.[56] The correctness and scope of this proposition are not free from doubt. Though a nullity decree in ecclesiastical law was susceptible to revision, it was final until reversed, and the question does not appear ever to have been judicially determined whether it was binding on third parties.[57]

The alleged declaratory nature of nullity decrees has been employed in aid of two contentions. First, it seems to have influenced the view that foreign decrees are liable to re-examination with regard to the choice of law rule applied by the adjudicating tribunal, particularly where they were pronounced in respect of marriages contracted in England. This heresy, which found its highwater mark in *Ogden* v. *Ogden*,[58] was exorcised by *Salvesen's Case* and does not call for further comment in this context. Secondly, it has supported the view that jurisdictional competence is governed by the principles applicable to proceedings in personam, or alternatively permits departures from otherwise accredited jurisdictional bases in ' deserving ' cases. Hence emanated the pleas of ' hardship ' and the outright claim for competence based on the *petitioner's* residence which was accepted in *Robert* v. *Robert*[59] on the ground that the petitioner ' was entitled to know whether, by English law, she was married or not '.

The present unsatisfactory state of the law is largely due to a failure by the courts to pursue the implications of the re-orientation effected by *Salvesen's Case* and to revalue the earlier precedents with a view to testing their compatibility with the underlying principles of that far-reaching decision. The final acceptance of the ' status principle ' has furnished an exclusive premise for the choice of appropriate jurisdictional requirements and necessitates a frank disavowal of the ill-assorted case law which in the previous period of judicial development has been accumulated on the quicksands of contradictory and irreconcilable conceptions relative to the juridical nature of the proceedings. In these circumstances, it is submitted, the domiciliary criterion alone provides the key for the final solution of this problem. The recent

[56] *Op. cit.* p. 474.
[57] See *Duchess of Kingston's Case* (1776) 20 St.Tr. 335, 340; Shelford, *op. cit.*, 469 ff.
[58] [1908] P. 46.
[59] [1947] P. 164.

development of departing from the accredited divorce formula by conceding, where appropriate, a separate domicile to the putative wife and of sustaining jurisdiction on the basis of either party's domicile [60] is a welcome innovation which should dispel the fear lest acceptance of an exclusive domiciliary jurisdictional practice should unnecessarily restrict the availability of judicial relief in these proceedings.

J. G. Fleming.[61]

[60] See Fleming, *The Parties' Domicil in Nullity Jurisdiction*, 1 Annual L.R. (Univ. W.Austr.), Part 2 (1949).

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NOTES

Recent English Decisions on Private International Law

The Administration of Assets

In the English conflict of laws it is well settled that, broadly speaking, the lex fori governs the administration of deceased persons' estates and the law of the domicile governs succession to movables. As Warrington L.J. put it in *Re Lorillard*[1]: 'The principle is that the administration of the estate of a deceased person is governed entirely by the lex loci' (*sc.* lex fori) 'and it is only when the administration is over that the law of his domicile comes in'. Difficult questions sometimes arise on the borderland between administration and succession. Thus, in *Re Wilks*,[2] it was held that the power to postpone the sale of assets conferred by section 33 (1) of the Administration of Estates Act, 1925, was part of the law of administration and not part of the law of succession, and thus could be exercised by the English administrator of an intestate who died domiciled abroad. In the recent case of *Re Goenaga*,[3] the court had to consider the nature of the rule of French law that the powers of a testamentary executor come to an end a year after the death. The testator, a Frenchman domiciled in France, made a will in England in the English language and form, in which he dealt with property in England and the British Empire and appointed an English executor. The will was formally valid by English and French law. Three years after his death the executor moved for probate. The motion was unopposed. Counsel for the executor cited the above passage from *Re Lorillard*, and Ormerod J. in a seven word judgment made the order as asked.

The decision is plainly right in the result in that it holds that restrictions on the powers of an executor are part of the law of administration and not part of the law of succession. Nevertheless, it is not in line with previous authority. In *Laneuville* v. *Anderson*[4] the testator, a British subject resident in France, made a will in the French language and form in which he appointed a universal legatee and also a testamentary executor. The will was not attested as required by the Wills Act, 1837. After the testator's

[1] [1922] 2 Ch. 638, 645–6.
[2] [1935] Ch. 645.
[3] [1949] P. 367.
[4] (1860) 2 Sw. & Tr. 24.

death the will was the subject of litigation both in England and in France. In England it was held by Sir John Dodson, and on appeal by the Privy Council, that the testator was domiciled in France at the date of his death. In France it was held by the Civil Tribune of the Seine, and on appeal by the Imperial Court of Paris and by the Cour de Cassation, that the will was formally valid by French law, and that the testamentary executor had no right to meddle in the estate, one year having elapsed since the testator's death. The testamentary executor then moved for probate in England (seven years after the death of the testator), his motion being opposed by the universal legatee and also by an executor appointed by an earlier will. Sir C. Cresswell held that the will was formally valid in England; that the testamentary executor had no right to probate; and he granted administration with the will annexed to the universal legatee. The learned judge drew a clear distinction between motions for probate made within the year allowed by French law, and motions made after that time had expired. 'It is one thing to say that a party appointed in general terms is entitled to probate in terms as general, leaving the question of the determination of the authority conferred to be decided by matter subsequent, and another thing to say that when the time within which the functions of an executor should have been discharged has expired, he is nevertheless entitled to come to this court and claim probate. . . . The rights of an executor to whom probate has been granted by an English court must be regulated by English law, but the meaning and effect of the appointment of an "executeur testamentaire" in such a will as that made in France by a domiciled Frenchman is a question of French law'.

With the exception of *Re Groos*,[5] no case has been found in which a foreign executor moved for probate in England within the time allowed by the foreign law, and the English court made a grant limited to that time. In *Re Groos* the matter arose in a curious way. The law of Holland is (or was) that a will must be made in notarial form and must specifically state restrictions that in other countries are matters of general law: that is, it must specifically except from its provisions the share of property which by law passes to the testator's family, and if it appoints an executor it must specifically limit his powers to one year from the death. In *Re Groos*, the testatrix, who was domiciled in Holland at the time when she made her will and in England at the time of her death,

[5] [1904] P. 269.

appointed her husband heir of the estate 'with reservation only of the legitimate portion which by law would devolve upon her relatives in a direct line', and appointed him executor during one year after her decease. In the first *Groos' Case*,[6] it was held that the testatrix' marriage to a domiciled Dutchman did not revoke her will; and that the executor was only entitled to a grant limited to the expiration of one year from the date of the testatrix' death. In the second *Groos' Case*,[7] it was held that the husband took the whole estate, the legitimate portion reserved by Dutch law having become inapplicable by reason of the change of domicile. It is submitted that there was no justification in the first *Groos' Case* for limiting the grant to one year, because the testatrix was not even domiciled in Holland at the date of her death, and in any case the matter should have been held to relate to administration and not to succession. It is of course possible for an English testator to appoint an executor for a limited period (*e.g.*, during widowhood or during majority), and if he does the grant of probate will be limited accordingly. But it is submitted that the court should have held that the appointment was limited only because Dutch law so required, and should have made an unlimited grant. That was how the court dealt with the question of construction in the second *Groos' Case*.

The *Goenaga Case* can be distinguished from the *Laneuville Case* in two ways, but neither is very satisfactory. (1) in the *Goenaga Case* the will was made in England in the English language and form, while in the *Laneuville Case* the will was made in France in the French language and form. But while the form and language of the will may be relevant to the question what law governs its construction, it is difficult to see what relevance it has to the question where the line is to be drawn between administration and succession. The place where the will was made seems to be equally immaterial. (2) In the *Laneuville Case* a court of the domicile had already decided that the testamentary executor had no right to meddle in the estate, while in the *Goenaga Case* it had not. But if restrictions on the powers of an executor are part of the law of administration, then a decision by the court of the domicile should not bind the court of administration. It is submitted that the two cases are irreconcilable, and that the *Goenaga Case* is correct and should be followed.

J. H. C. Morris.

[6] [1904] P. 269.
[7] [1915] 1 Ch. 572.

Jurisdiction under the Matrimonial Causes Act, 1937, s. 8

In *Wall* v. *Wall* [1] Pearce J. was confronted with a novel point. Has the English court jurisdiction to pronounce a decree of presumption of death and dissolution of marriages under section 8 (1) of the Matrimonial Causes Act, 1937, in a case in which the petitioner is resident, but not domiciled, in England? After a comprehensive review of the development of the law as to the jurisdiction of the English courts in matrimonial causes, Pearce J. concluded that 'concurrently with the refusal of the court to entertain suits for dissolution of marriage where a foreign domicile is involved, there has been an acceptance by it of suits that do involve an alteration in status and are equivalent to judgments *in rem*'.[2]

His Lordship then pointed out that having regard to the fact that the principal sections of the Judicature Act, 1925, applicable to matrimonial causes were excluded in the cases of applications under the Act of 1937, the case was, in the view of the Legislature, different from the ordinary petition for divorce. 'Its primary and essential purpose is to enable a petitioner to have it declared that the other party to the marriage is presumed to be dead. . . . Since facts sometimes belie presumptions provision was made for the fact that occasionally spouses who were presumed dead would in fact be still living. . . . It is fair to assume that in most cases where it is reasonable to presume death the decree of dissolution will not dissolve an existing marriage, since death will already have dissolved it, but in the occasional cases where the person presumed dead is alive, the safeguard will take effect.' [3]

His Lordship accordingly held that he had jurisdiction, and granted a decree to the petitioner, who was, in the case before him, the wife. It is clear that the principle on which he acted would be equally applicable in cases in which the petitioner was a husband, resident but not domiciled in England. Accordingly, it is important to bear in mind the provisions of section 1 (3) of the Law Reform (Miscellaneous Provisions) Act, 1949, so far as future cases are concerned. Under this subsection the court has jurisdiction under section 8 (1) of the Act of 1937 in any case in which the petitioner is domiciled in England, and, in the case of a petition by the wife, if she is resident in England, or has been ordinarily resident there for three years immediately preceding the commencement of the proceedings, but in no other case. Accordingly, domicile is, for

[1] [1949] 2 All E.R. 927.
[2] At p. 929.
[3] At p. 930.

the future, the only basis of jurisdiction in the case of a petition by the husband under section 8 (1) of the Matrimonial Causes Act, 1937.

It is a little difficult to see why, in this respect, there should be a discrimination in favour of the wife in the matter of jurisdiction. It cannot be because the wife is incapable of acquiring a domicile of her own during the subsistence of the marriage, because the subsection expressly provides that, in determining, in such a case, whether a woman is domiciled in England, her husband shall be treated as having died immediately after the last occasion on which she knew, or had reason to believe, him to be living. However, in view of the rarity of proceedings for presumption of death and dissolution of marriage, it is unlikely that the less favourable position of the husband, so far as the jurisdiction of the court is concerned, will develop into a much discussed case of hardship in the private international law of the future.

The Recognition of a Foreign Nullity Decree

In *Chapelle* v. *Chapelle* [1] Willmer J. was, on the view which he took of the case, called upon to decide whether the English courts will recognise a foreign nullity decree, which has been pronounced by the court of the domicile of one only of the parties to the marriage : a problem which was said by Lord Phillimore to be almost insoluble.[2]

The parties were married in England in 1931, when the husband was domiciled in Malta, and the wife was domiciled in England. The marriage was celebrated in this country, because the wife had been divorced in 1928, and marriage with a divorced person, during the life of the former spouse, is void by Maltese law. No importance was attached to this aspect of the case by the learned judge, and it is, therefore, unnecessary to deal with it in this note.

The parties cohabited in Malta from 1931 to 1941, when the husband went abroad on war service, and the wife came to England where she had since resided. In 1943, the husband returned to Malta, and sought a decree of nullity which was pronounced by His Majesty's Civil Court in Malta in 1944. The ground of the decree was that the marriage (which had taken place in a register office), had not been celebrated in accordance with the canon law, and was accordingly defective in form, and void *ab initio* by Maltese law.

[1] [1950] 1 All E.R. 236.
[2] *Salvesen* v. *Administrator of Austrian Property* [1927] A.C. 641, 669.

The husband then acquired a domicile of choice in England, and, wishing to safeguard his position in the event of remarriage, petitioned for divorce on the grounds of adultery, and desertion since 1941. As a preliminary issue, the wife questioned the competence of the English court to entertain the suit, alleging that the Maltese decree was binding because it had been pronounced by the court of her domicile. She contended that she was domiciled in Malta when the nullity proceedings were instituted there by her husband, (a) because her marriage was valid by English law, so that she acquired her husband's domicile by operation of law; and (b) because she acquired a Maltese domicile of choice in 1931, and had not lost it in 1943.

So far as the first contention was concerned, Willmer J. decided against the wife on the ground that she could not, ' at one and the same time, claim a common domicile with her husband in Malta, and yet rely on the decree of the Maltese court which destroys the foundation on which that claim is based '.[3] With regard to the second contention, his Lordship held that, although the wife acquired a domicile of choice in Malta, he could not, on the material before him, decide whether she retained it on leaving Malta in 1941. He therefore reserved this question of fact to be dealt with on the hearing of the divorce petition.

Although it is not clear how fully the point was argued before him, it is plain that the learned judge was not prepared to recognise the Maltese decree as having been pronounced by the court of the husband's domicile, if the wife had lost her Maltese domicile of choice at the inception of the Maltese proceedings; for he would not ' accept as binding a decree of the court in Malta, which, by its very terms, destroys the one and only ground on which the claim to exercise jurisdiction over the wife could be based '.[4]

In view of the notorious difficulty of the matters under consideration, the following submissions are made with the utmost diffidence. They are (1) that the learned judge was wrong in holding that the wife did not acquire the husband's domicile by operation of law, and that he should accordingly have recognised the Maltese decree as a judgment *in rem* pronounced in the common domicile of the parties on the principle of *Salvesen* v. *Administrator of Austrian Property*[5]; (2) that the recognition in England of a nullity decree pronounced by the court of the domicile of one only of the parties is both sociologically desirable, and logically necessary; and (3) that the problem of the recognition of such a decree

[3] [1950] 1 All E.R. 236, 240.
[4] At p. 240.
[5] [1927] A.C. 641.

requires reconsideration in the light of the decision of the Court of Appeal in *De Reneville* v. *De Reneville*.[6]

(1) The Domicile of the Wife

The question whether the wife was domiciled in Malta, when the proceedings were instituted there, is anterior to that of the recognition of the nullity decree. Thus, Willmer J. said that, if he accepted the premise that both parties were domiciled in Malta '*at the time of the commencement of the Maltese proceedings*', he had no doubt that the conclusion contended for by the wife would follow.[7] The proceedings were begun in June, 1943, and the decree, for the recognition of which the wife was contending, was pronounced in August, 1944. Why should its terms be decisive of the question whether the wife had her husband's domicile by operation of law more than a year earlier?

The answer to the above question cannot be that the decree was evidence of the fact that the marriage was void, in point of form under Maltese law, for that fact is demonstrably irrelevant. Nor can the answer be that the decree was pronounced with retrospective effect, because that would be equally true of the annulment of a voidable marriage, by virtue of which a wife indubitably acquires her husband's domicile.

The Irrelevance of the Formal Invalidity of the Marriage by Maltese Law.

Willmer J. referred to the reasoning of Lord Greene M.R. in *De Reneville* v. *De Reneville*,[8] 'where he stresses the distinction in relation to domicile in proceedings for nullity between marriages which are void *ab initio*, and those which are merely voidable'.[9] It is respectfully submitted that he was right in doing so, for, although *De Reneville* v. *De Reneville* was a case concerning the jurisdiction of the English court, the domicile of the wife must likewise be determined by that court when the issue is as to the competence of a foreign tribunal to entertain a suit for nullity. However, it is also respectfully submitted that Willmer J. disregarded an important link in the chain of reasoning of Lord Greene M.R.

The view of the learned Master of the Rolls was that the question of the wife's domicile at the relevant date could not be resolved until two other questions had been answered. 'Namely,

[6] [1948] P. 100.
[7] [1950] 1 All E.R. 236, 238.
[8] [1948] P. 100.
[9] [1950] 1 All E.R. 236, 239.

(a) was the marriage a void or voidable one, and (b) by reference to what law will the English court decide whether it was void or voidable?'[10] If Willmer J. had asked these questions, instead of immediately concluding that, because the marriage was formally void by Maltese law, the wife could not claim to be domiciled in Malta by virtue of the marriage, it seems that he should have given the following answers: (a) by English law the marriage was neither void, nor voidable, but valid; by Maltese law it was void; (b) 'as the validity of a marriage so far as regards the observance of formalities is a matter for the *lex loci celebrationis*,[11] English law must determine the validity of the marriage in this case. It would then have followed that the wife was domiciled in Malta in June, 1943, and the decree of 1944 should be recognised because it was pronounced in proceedings instituted in the common domicile of the parties, notwithstanding the facts that it related to an English marriage, and that the Maltese court had followed a different choice of law rule than that which would have been adopted by an English court.[12]

In order to test the validity of the above submission, let us suppose that the question of Mrs. Chapelle's domicile, in June, 1943, had come before the English court later in that year, on an issue as to succession to movables. The marriage being formally valid by English law, the court would have been bound to hold that Mrs. Chapelle was domiciled in Malta in June, 1943, by virtue of her marriage to a man who was then domiciled there. It could not have held, as Willmer J. has held, that she was domiciled in England in June, 1943, on the ground that the marriage was formally void by Maltese law, without contravening the settled rule of English private international law that the formal validity of a marriage is a matter for the *lex loci celebrationis*.

Retrospective Operation of Decree Immaterial.

If the question of Mrs. Chapelle's domicile in June, 1943, were to come before the English courts today, on an issue as to succession to movables, it does not follow that, if they were to recognise the decree of 1944 as it has been submitted they should, they would also hold that she was domiciled in England in June, 1943, because of its retrospective operation. On the contrary, if 'the fact that a domicile has been acquired by reason of a voidable marriage is a fact, the existence of which cannot be undone by a declaration of

[10] [1948] P. 100, 111.
[11] [1948] P. 100, 114.
[12] *Galene* v. *Galene* [1939] P. 237.

nullity',[13] it would seem to follow that a decree annulling a marriage which was not merely voidable, but valid, should not be held to have a retrospective effect on the wife's domicile.

The judgment in *Chapelle* v. *Chapelle* appears to confuse two questions: (a) Should the Maltese nullity decree be recognised in England? and (b) Does it affect the wife's domicile retrospectively? With all respect to Willmer J., Mrs. Chapelle was not, at one and the same time, claiming a common domicile with her husband in Malta, and yet relying on the decree of the Maltese court which destroyed the foundation on which that claim was based. She was first claiming a common domicile with her husband by virtue of the rules of English private international law, and then asking for the decree to be recognised because of that common domicile, which, according to the principles laid down in *De Reneville* v. *De Reneville*, could not be affected by the retrospective operation of the decree. The result of the confusion of the two questions mentioned above is that Willmer J. has held (a) that the Maltese decree cannot be recognised in England, and (b) that its retrospective operation denies to Mrs. Chapelle a Maltese domicile by virtue of her marriage. This seems to be a 'plain contradiction in terms'.

(2) Nullity Decree in Domicile of One Party Only

Assuming that contrary to the above submission Mrs. Chapelle was domiciled in England, when the nullity proceedings were instituted by her husband in his Maltese domicile, ought the decree which was pronounced in those proceedings to be recognised in England? There is no English authority directly bearing on this point, as Willmer J. observed,[14] but he appears to have based his negative answer, in part at least, on the reasoning of Sir Gorell Barnes P. in *Ogden* v. *Ogden*.[15]

Willmer J. regarded the actual decision in that case as having been overruled by the House of Lords in *Salvesen* v. *Administrator of Austrian Property*,[16] 'for in *Ogden's Case*, the marriage, being merely voidable, remained valid until avoided. Consequently, the woman by her marriage acquired her first husband's French domicile, and, therefore, in accordance with the principle settled in *Salvesen's Case*, the decree of the French court, being the court of common domicile, ought to have been accepted as binding and conclusive in this country'.[17]

[13] [1948] P. 100, 111–2, *per* Lord Greene M.R.
[14] [1950] 1 All E.R. 236, 239–40.
[15] [1908] P. 46, 78.
[16] [1927] A.C. 641.
[17] [1950] 1 All E.R. 236, 240.

Willmer J. referred to the passages in the speeches of the House of Lords in *Salvesen's Case*, in which *Ogden* v. *Ogden* was discussed (*ibid.*); but it is difficult to read these passages 'as an expression of opinion on a point which did not arise, and was not for consideration, namely, has . . . a court jurisdiction where one only of the parties is subject to its law, that is domiciled in its country'.[18]

In the absence of authority, sociological and logical considerations become peculiarly relevant. So far as the former are concerned, it is only necessary to point out that the refusal to recognise a nullity decree pronounced in the domicile of one only of the parties to a marriage, provides one more situation in which a person may be a spouse in one country, and unmarried in another.

So far as logical considerations are concerned, the Court of Appeal has decided that the English courts have jurisdiction to annul a void marriage where one party only is domiciled in England.[19] 'If the law is to be a harmonious whole, it seems essential that what entitles an English court to assume jurisdiction should be equally effective in the case of a foreign court'.[20] It is submitted that this consideration alone should have sufficed to induce Willmer J., who omitted the above sentence in his citation from Professor Cheshire's work,[21] to do what the South African courts have done in the case of *De Bono* v. *De Bono*.[22] In that case, the facts were identical with those of *Chapelle* v. *Chapelle*, so far as the matters discussed in this note are concerned. Herbstein J., who was content to take his law from Professor Cheshire,[23] recognised the Maltese decree.

(3) The Effect of De Reneville *v.* De Reneville

Consistency with the principles laid down in *De Reneville* v. *De Reneville* as to void and voidable marriages, demands that, in the case of the former, the nullity decree of the domicile of one only of the parties should be recognised.

'A void marriage is one that will be regarded by every court in any cases in which the existence of the marriage is in issue as never having taken place, and can be so treated by both parties to it without the necessity of any decree annulling it'.[24] It is for the English court to decide whether the marriage is void, 'not merely in a verbal sense, but in the sense of the words as understood in

[18] [1948] P. 100, 110, *per* Lord Greene M.R.
[19] *De Reneville* v. *De Reneville* [1948] P. 100.
[20] Cheshire, *Private International Law* (3rd ed.), p. 464.
[21] [1950] 1 All E.R. 236, 240.
[22] [1948] S.A.L.R. 802.
[23] (2nd ed.), pp. 352–3.
[24] [1948] P. 100, 111, *per* Lord Greene M.R.

this country, that is, as indicating, or not indicating, as the case might be, that the marriage would be regarded . . . as a nullity, without the necessity of a decree annulling it '.[25]

When questions of jurisdiction are being considered, it is necessary for the court to assume that the facts relied on by the person alleging the marriage to be void are proved. Thus, in *De Reneville* v. *De Reneville* itself, the English court held that it would have jurisdiction if, by French law, either incurable impotence, or wilful refusal to consummate, rendered the marriage void *ab initio*. It does not follow that, if the jurisdiction had been exercised on the basis of the petitioner's supposed domicile in England, she would have been granted a decree, for she might have failed to prove her case. The dismissal of her petition would have been tantamount to a finding that she was domiciled in France, because, the alleged grounds of nullity being non-existent, the marriage was not, after all, void.

Conversely, where the question is as to the jurisdiction of a foreign court, the English court must determine whether, on proof of certain facts, the marriage will be void according to the appropriate choice of law rule. The *lex loci* will be invoked, if the allegation is that the marriage was void in point of form, the law of the antenuptial domicile of each of the parties, or, on Professor Cheshire's view, the law of the husband's domicile, if the allegation is that the marriage is void for want of capacity, and so on. Having come to the conclusion that the marriage would be void according to the rules of English private international law, on proof of the relevant facts, the English court must, it is submitted, recognise a decree pronounced in the domicile of one of the parties for the following reason: The facts necessary to establish the invalidity of the marriage according to the appropriate choice of law rule, either can or else cannot be proved to the satisfaction of the court. If they can be so proved, then, *ex hypothesi*, the marriage is one which is a nullity without the necessity of a decree, and it would therefore be pointless to refuse to recognise the decree of any court annulling it. If, on the other hand, the relevant facts could not be proved to the satisfaction of the English court, *ex hypothesi*, the marriage is, in its eyes, not a void one, and the decree is therefore that of the country which it regards as the common domicile of the parties. The latter consideration would not apply where the foreign decree was based on residence alone, and that may be a ground for refusing to recognise jurisdiction exercised on this basis.

[25] *Ibid.*, p. 115.

The above argument may be illustrated by supposing facts which are the converse of such a case as *White* v. *White*.[26] A man, domiciled in New South Wales, marries a woman, domiciled in England, in Melbourne. The woman believes that he has committed bigamy, and returns forthwith to England, so that, if the marriage really is void by English law, there can be no question of her having acquired a domicile of choice in New South Wales. The marriage is annulled by the court of that country, on the petition of the husband, on the ground of bigamy, or on any other ground, for that matter. The decree should, it is submitted, be recognised in England, although it may appear to 'destroy the one and only ground over which the claim to exercise jurisdiction over the wife was based'. So far as the facts of the case are concerned, either the husband has committed bigamy or else he has not. If he has, the marriage was void in the English sense of the word, and, no decree being necessary, it would be pointless for the English court to decline to recognise one that had in fact been made. If the husband had not committed bigamy, the marriage was valid according to the rules of English private international law, therefore the wife acquired her husband's domicile by operation of law. Accordingly, the New South Wales decree would be that of the common domicile of the parties, and entitled to recognition irrespective of the grounds upon which it was pronounced.

This is, of course, a very simple illustration, but the same analysis may be applied to more complicated situations in which recognition is sought for a decree of the domicile of one of the parties to a marriage alleged to be void according to the rules of English private international law. Therefore, it is submitted that, although the judgments in *De Reneville* v. *De Reneville* may have brought some problems of their own in their train, they at least solve the problem of the recognition of a foreign nullity decree pronounced in the domicile of one only of the parties, by showing that it does not exist.

Chapelle v. *Chapelle* suggests that the problem does still exist, but, if the submission made in the first part of this note is correct, this is because Willmer J. refused to accept the consequence of the validity of the marriage under the rules of English private international law, namely, the common domicile of husband and wife.

Rupert Cross.[27]

[26] [1937] P. 111.
[27] Fellow of Magdalen College, Oxford.

The Proper Law of the Contract

Twice in recent months—once expressly [1] and once by clear implication [2]—the House of Lords has placed the stamp of its approval on the perpetuation by the learned editors in the sixth edition of Dicey, of the suggestion that the '"proper law of a contract" means the law or laws by which the parties intended, or may fairly be presumed to have intended, the contract to be governed'.[3] The judgments of Lord Radcliffe alone appear to be based on a predominantly objective approach.

In *Kahler* v. *Midland Bank* it is noteworthy that the majority of their Lordships purported to apply the subjective test to a fact situation in which the parties had not expressly named a proper law. That the difficulties inherent in this task led to recourse being made to tests which were in substance of a barely disguised objective nature is significant if not surprising.

The facts of the *Kahler Case* were that the appellant being in 1938 a Czechoslovak national residing in Prague became a customer of the Z bank. He entered into a contract of bailment with that bank in respect of certain bearer securities. The contract was entered into in Czechoslovakia between two Czechoslovaks. The securities, however, were then and remained in the respondents' bank in London, being held by the respondents as bailees of the Z bank. In 1939 the appellant transferred his account from the Z bank to the B bank. The B bank was a Czech bank under German control. The respondents then became the bailees of the B bank. In the same year the appellant left Czechoslovakia, and was deprived by the Germans of his rights in respect of the securities. In May, 1946, his rights *vis-a-vis* the B bank were restored to him by the Czechoslovak authorities; but under the Czechoslovak law (similar exchange control regulations having been in operation in that country at all material times) any transfer of foreign securities from or to a Czech resident without the permission of the Czechoslovak National Bank was unlawful. It may be noted that this control regulation (which figures in both cases) was not regarded as a penal, confiscatory or fiscal law of such a nature as to be unenforceable in an English court. In the *Kahler Case*, at the time of the action the appellant was no longer a Czech resident, but the B bank was a Czech resident for the purposes of the regulation. The necessary permission for the

[1] *Kahler* v. *Midland Bank, Ltd.* [1950] A.C. 24.
[2] *Zivnostenska Banka National Corporation* v. *Frankman* [1949] 2 All E.R. 671, now also reported at [1950] A.C. 57.
[3] Dicey, *Conflict of Laws*, 6th ed., p. 579, cited by Lord Simonds [1950] A.C., at pp. 28–9.

transfer was refused. The appellant framed his claim in contract and detinue. The former claim is of little interest. The respondents' answer to the detinue claim was that the appellant had no immediate right to possession, because the proper law of the contract of bailment was Czech law, according to which delivery by them would be illegal. The House (Lord MacDermott and Lord Reid dissenting) found for the respondents.

Lord Simonds cites with approval Dicey's Rule 136. He recites all the factors which connect the contract with Czechoslovakia and he is then able to derive a 'fair presumption' from 'the whole of the circumstances of the contract, unusual and artificial as they are . . . that the parties intended the law of Czechoslovakia to govern it in all its aspects'.[4] Lord Normand, too, restates the subjective test, but observes that 'To ask what law the parties intended to govern the contract, is to ask a question that admits only of an artificial answer',[5] and proceeds to the conclusion that the proper law of the contract is clearly Czech law, for reasons which it is submitted can, owing to the lack of evidence of intention, only be objective. Lord MacDermott also professes a subjective approach. He holds the proper law of the contract is to 'a substantial extent' that of Czechoslovakia, but dissents from the majority on the grounds that the proper law as regards performance was in his view English law. On this latter point, however, he doubts 'if the facts justify an inference of agreement'.[6] Lord Reid bases his dissent on different grounds. He finds that the proper law of the contract between the Z bank and the appellant was Czech law, but the proper law of the contract between the B bank and the appellant was English law. In both instances he endeavours to pay regard to subjective rules, but he concludes 'I realise that there are so many suppositions and hypotheses involved and there is so much unreality in the case that my conclusions may well be erroneous'.[7] Admissions such as these cast some doubt on the reality of the application of the subjective test. Moreover, like the fact of equal division of those of their Lordships who professedly applied that test, they suggest that the vice of uncertainty is not —at least in cases where no proper law is expressly named by the parties—exclusively the outcome of an objective approach.[8]

Lord Radcliffe reaches the conclusion that the proper law of the contract of bailment was Czech law on simple objective grounds.

[4] At pp. 28–9.
[5] At p. 35.
[6] At p. 42.
[7] At p. 52.
[8] It is interesting to note that Dr. Mann, a subjectivist, has doubts as to the correctness of the *Kahler* decision. See this journal, Vol. 3, p. 68, note 28.

Having enumerated the various Czech connecting factors, he concludes 'These considerations outweigh any other in determining the proper law of the contract'.[9] His only reference to a subjective test is when considering (obiter in view of the pleadings) the proper law of the bailment between the appellant and the B bank 'No doubt Mr. Kahler, who was leaving Czechoslovakia, perhaps for ever, would have chosen some other law, had he been free to choose. What the bank would or could have accepted is another matter. But, in truth, the speculation seems to me aimless for, had Mr Kahler been free to choose, he would not have transferred his account to the Bohemian Bank at all'.[10]

In *Zivnostenska Banka National Corporation* v. *Frankman*[11] the respondent as personal representative of Mrs. Frankman, claimed redelivery in London of £300 debentures in a Czech company from the appellants, a Czech bank with its head office in Prague and a branch in London. In 1938 the deceased had been informed by the appellants that her debentures were deposited at their London branch and would remain there at her own risk unless she otherwise ordered. She received with this notification a document setting out the conditions of the contract. Condition 11 provided that stocks and securities purchased or received outside Prague would remain (unless the customer ordered transmission at his own expense and risk) 'at the risk and expense of the customer deposited with our correspondent, where they shall be subject to the legal measures of the respective country'. Condition 50 provided 'The place of performance and payment in respect of all obligations resulting from the business connection with us, shall be considered to be the place of that department of our establishment which has carried out the relevant transactions with the customer, except in so far as any other special stipulation has been made in this connection'.

In 1939 Mrs. Frankman came to England where she resided until her death in 1945. The appellants, like the respondents in the *Kahler Case*, asserted no beneficial interest in the debentures, but refused to redeliver them to the respondent because under Czech law the return of securities was only permissible with the consent of the National Bank of Czechoslovakia and this had been refused. The House of Lords held that the *lex loci contractus* was Czech law and that under the contract the *locus solutionis* was Prague and therefore Czech law was also the *lex loci solutionis*.

[9] At p. 54.
[10] At p. 55.
[11] [1949] 2 All E.R. 671.

The judgment of Cassels J. in favour of the bank was therefore restored.

As far as the actual decision goes, the case is not of great interest for it depended ' on the language of the particular documents by which the transaction to be considered by the House was carried out '. The approach of their Lordships (except Lord Radcliffe) to the problem of the proper law is again subjective. They investigate with care the intention of the parties as expressed in Clauses 11 and 50. Clause 11 is in effect a mere warning that securities kept in other countries are kept at the risk of the owner, one of the incidents of such risk being their subjection to the law of the place of deposit. The purpose of the clause is limited to the protection of the bank: it in no way implies that the contractual rights of the parties should be governed by a non-Czech law. As the ' relevant transactions ' referred to in Clause 50 were carried out with the head office, it was clear that the parties expressly stipulated that ' the *place* of performance and payment in respect of all obligations under the contract is to be Prague '.[12] This is construed as an expression of intention that the *law* governing performance should be Czech law : ' the parties to the contract have agreed that Prague is to be considered as the place for delivery up of the bonds. That being their expressed intention I can see no ground for saying that the proper law in this connection is other than that of Czechoslovakia '.[13] In the view of Lord Simonds Clause 50 is ' conclusive '. Lord Reid's admission, however, that ' it may well be that Mrs. Frankman intended that the property deposited outside that country should not be held under a contract which had any relation to the law of that country, but it is not so clear that that would be the intention of a Czechoslovakian bank '[14] indicates an element of artificiality in imputing an intention to parties where, although the parties may have expressed some intention as to what law should govern, the intention is not clearly a common one and its expression is not unequivocal.

Lord Radcliffe here, as in the *Kahler Case*, is clearly objective in his approach : ' However far one may go in regarding London as the place in which this contract was expected or even was required to be performed, the circumstances of the contract as a whole are such that the law of England cannot be held to displace the law of Czechoslovakia as the proper law of this contract '.[15]

In the view of the present writer the case of *Kahler* v. *Midland*

[12] Lord Normand, at p. 677 (italics mine).
[13] Lord MacDermott, at p. 679.
[14] At p. 683.
[15] At p. 684.

Bank is a clear illustration, and that of *Zivnostenska Banka National Corporation* v. *Frankman* is hardly less indicative, of the absurd artificiality involved in attempting to apply a rule of law based on presumed common intention, to fact situations in which either such common intention is non-existent or its determination is a matter of the merest conjecture. In cases where the parties *do* expressly name a proper law, whether or not effect should be given to that intention is a question which can only be resolved in accordance with the demands of policy. This question is in England perhaps still an open one. Suffice it to observe that fallacies and irrelevancies inherent in arguments based on mechanical logic and sometimes tendered in support of the objectivist approach should not be allowed to screen the powerful nature of the policy arguments upon which the protagonists of objectivity can more honourably rely.

But in cases where the parties do *not* expressly name a proper law, the relative merits and demerits of the two traditional approaches should not fall to be considered. It is of the objective test alone that the facts of such a situation permit conscientious and realistic application.

P. B. Carter.[16]

Domicile

Re Wallach [1] provides clear confirmation of Dicey's sub-rule (2) to Rule 11 which states that a widow retains her late husband's last domicile until she changes it.[2] Plaintiff claimed that the deceased had died domiciled in France or Germany, and that he was entitled under the law of either State to a share in her estate. The Treasury Solicitor, defendant in the probate proceedings, contended that deceased died intestate domiciled in England, and that as no one was entitled to claim any part of the estate under the provisions of the Administration of Estates Act, 1925, he alone was entitled to succeed. The Treasury Solicitor argued that a woman whose domicile of origin was changed on marriage to that of her husband, reverts automatically on widowhood to her domicile of origin. The case is reported on this point only.

Hodson J. rejected this argument. It is clear that the authorities on which the learned judge relied support his view. In *Gout* v. *Zimmermann* [3] it was argued that a widow whose domicile of origin was somewhat uncertain, and who acquired an English domicile

[16] Fellow of Walham College, Oxford.
[1] (1950) 66 T.L.R. 132.
[2] *Conflict of Laws* (6th ed.), p. 111.
[3] (1847) 5 Notes of Cases 440.

by marriage, reverted to her domicile of origin after her husband's death. This contention was rejected by the learned judge, Sir H. Jenner Fust, who made clear that some *act* on the part of the widow was required to permit the resumption of her domicile of origin. Thus he spoke of her as 'having done no act whereby she divested herself of the character she acquired by her marriage'.[4] In that case, however, counsel did not argue that a widow *automatically* resumed her domicile of origin. His contention was simply that a domicile of origin was more easily re-acquired than a domicile of choice was acquired, and that the widow's continued residence abroad after the death of her husband without the maintenance of any close ties with England led to a resumption of her domicile of origin. In the *Goods of Raffenel*,[5] a widow, with an English domicile of origin acquired her husband's French domicile by marriage. After his death she took steps to return to England, even to the extent of embarking at Calais. She was compelled to leave the ship because of illness and died in France a few months later. It was held that she had died domiciled in France. Here again counsel did not argue that a domicile of origin was resumed *automatically* on widowhood, but submitted that the steps which the widow had taken to leave France sufficed to give effect to her intention to resume her domicile of origin. This argument was rejected by Sir C. Cresswell who held that mere intention did not suffice, so long as she had not in fact left France.

Re Wallach concludes the matter, since in that case the question was argued specifically on the point of *automatic* reverter. It is submitted with respect that the decision is wholly to be approved. The peculiar English emphasis on the domicile of origin in the law of domicile has been sharply criticised in many quarters.[6] Such decisions as *Ramsay* v. *Liverpool Corporation*[7] lead one to doubt whether the policy considerations underlying reference to the concept of domicile for any purpose have not been in some measure forgotten. American courts have refused to follow the English doctrines on this point, even in a case in which a man died while en route to his domicile of origin: see *Re Estate of Jones*.[8] The Restatement of the Conflict of Laws provides[9] that a domicile once established continues until it is superseded by a new domicile. In no case is any resort made to the domicile of origin, as such, to fill a gap.

[4] At p. 447.
[5] (1863) 3 Sw. & Tr. 49.
[6] See, *e.g.*, Wolff, *Private International Law*, p. 108. Cheshire, *Private International Law* (3rd ed.), pp. 219–20. Willis 14 Canadian B.R., pp. 4, 5.
[7] [1930] A.C. 588.
[8] (1921) 192 Iowa 78.
[9] Section 23.

Admittedly circumstances will arise in which a vacuum will have to be filled, and in any such case whatever domicile is assigned to a person must necessarily bear a tenuous relationship to the policy considerations which underlie resort to the law of the domicile. But wherever those policy considerations (which are based upon the closeness of connection with a particular law district) are capable of being realised, it is submitted that it is altogether undesirable to defeat them by resort to any doctrine of the primacy of the domicile of origin. This is a mechanical jurisprudence par excellence, and Hodson J.'s refusal to accede to the argument that a widow's domicile of origin is automatically resumed on widowhood is to be warmly applauded.

There is one point in the judgment of Hodson J. to which reference may be made. The learned judge cited the speech of Lord Westbury in *Udny* v. *Udny*,[10] where the learned Lord after referring to the domicile of origin said : ' Other domiciles, including domicile by operation of law, as on marriage, are domiciles of choice '. Hodson J. considered this an appropriate classification, as a woman on marrying exercises a choice and must take the consequences of the rule that her domicile must follow her husband's. Therefore, since this is a domicile of choice, it should only be lost in the same way as other domiciles of choice. With respect, this way of approaching the matter does not seem to be altogether satisfactory. To call the domicile of a dependent person, other than his domicile of origin, a domicile of choice, is not a felicitous choice of language. If a legitimate infant's domicile of origin is changed at the age of five by a change of his father's domicile, the term domicile of choice is scarcely appropriate to describe the infant's new domiciliary status. In the case of a married woman, there is, it is true, some original element of choice, but it is more desirable, surely, to classify separately all such domiciles as depend upon the act of another party as dependent domiciles. The sentence quoted from Lord Westbury's speech in *Udny* v. *Udny*, is immediately followed by one whose connection with the preceding one is not immediately obvious in relation to the point under consideration. Quoting the two sentences together he says :—

> ' Other domiciles, including domicile by operation of law, as on marriage, are domiciles of choice. For as soon as an individual is *sui juris* it is competent to him to elect and assume another domicile the continuance of which depends upon his will and act '.[11]

[10] (1869) L.R. 1 Sc. & Div. 441, 457.
[11] *Ibid.*

This does not explain why a dependent domicile is to be classified as a domicile of choice. It is submitted that the best approach to the problem in *Re Wallach* is that in the case of a dependent domicile there is no sound reason for holding that there is an automatic resumption of the domicile of origin on the determination of the dependent status. This is realistic and in line with the policy underlying the domicile rule. But it is submitted that to treat dependent domiciles as domiciles of choice, subject to the same rules as other domiciles of choice, leads to a resort to conceptualism from which this decision is otherwise happily free.

Tort: Action for Damages for Adultery Against a Co-Respondent by a Petitioner Not Domiciled in England

In the sixth edition of *Dicey*, the learned editor observes that 'there does not appear to be a fully reported case supporting the view that a petitioner who is not domiciled on England can claim damages'[1] for adultery against a co-respondent. *Bell* v. *Bell and Cooke*[2] referred to in *Dicey*, was only very briefly reported in the *Times* newspaper. In that case Lord Merrivale P. sitting with a jury awarded damages to a petitioner domiciled in Scotland who had obtained a decree nisi against his wife and now brought an action for damages against the co-respondent, who was domiciled in England, in respect of adultery committed in Scotland.

Jacobs v. *Jacobs and Ceen*[3] is a fully reported and considered decision on this point. In this case, the husband who was domiciled and resident in South Africa, filed a petition for divorce against his wife in South Africa, alleging adultery with the co-respondent in England. No claim for damages was made in South Africa, but before the divorce action was heard, the husband filed a petition in England, claiming damages against the co-respondent. After a decree of divorce had been granted to the petitioner in South Africa, the co-respondent entered an appearance under protest in England. He argued that the English court had no jurisdiction to entertain the suit because the petitioner was not domiciled in England. On an issue directed to try the question of jurisdiction, Pilcher J. held that the court had jurisdiction to hear the action.

The question turned upon the interpretation of section 189 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925. This

[1] Dicey, *Conflict of Laws* (6th ed., 1949), p. 230.
[2] *Times* Newspaper, June 10, 1932.
[3] [1950] 1 All E.R. 96.

section which re-enacts with only verbal alterations the terms of the Matrimonial Causes Act, 1857, s. 33,[4] provides:

> 'A husband may on a petition for divorce or for judicial separation or for damages only, claim damages from any person on the ground of adultery with the wife of the petitioner'.

It was argued on behalf of the co-respondent that the words 'a husband' must be read subject to the qualification that the personal action for damages for adultery is ancillary to a petition for one of the two forms of matrimonial relief referred to in the section. This means that in the case of dissolution of marriage, jurisdiction depends upon the domicile of the husband, and ancillary relief in the nature of damages could only be granted to a petitioner domiciled in England.

There is some judicial support for this argument. In *Harris* v. *Taylor* the plaintiff brought an action on a Manx judgment for damages for adultery. Defendant had appeared conditionally in the Manx proceedings where his principal argument was that the court had no jurisdiction. On the ground of his appearance in the Manx proceedings, Bray J.[5] and the Court of Appeal[6] held that the English action on the foreign judgment must succeed. The Court of Appeal in fact confined their judgment to this point. However Bray J. also dealt with the argument that the plaintiff might have brought his action for damages for adultery in England. This he rejected as the plaintiff was domiciled in the Isle of Man. In the opinion of the learned judge section 33 of the Matrimonial Causes Act, which was then the applicable section, must be restrictively construed.

> 'I think "any husband" must mean "any husband who can file a petition for dissolution or judicial separation"'.[7]

In support of this view, Bray J. cited the judgment of Scrutton J. in *Phillips* v. *Batho*.[8] In that case the petitioner who was domiciled in India sued there for divorce on the ground of adultery. The co-respondent who was not personally served in India, left that country before the hearing and though served by registered post in England in accordance with the Rules of the Indian High Court, did not enter an appearance. A decree was pronounced and damages awarded against the co-respondent. In an action on this

[4] This reads as follows: 'Any husband may either in a petition for dissolution of marriage or for judicial separation, or in a petition limited to such object only, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner'.
[5] 111 L.T. 564.
[6] [1915] 2 K.B. 580.
[7] 111 L.T. 564.
[8] [1913] 3 K.B. 25.

judgment brought against the co-respondent in England, Scrutton J. upheld the plaintiff's claim. The learned judge said:

> 'Ancillary and accessory to the judgment as to status is the power to give damages against the person causing the marriage to be dissolved. This power is recognised both by the English courts and the Indian courts. The English courts will recognise and enforce the judgments as to status of the India courts in matters within their jurisdiction, and I think they will also recognise and enforce the ancillary orders as to damages, such as they themselves make in similar cases'.[9]

Scrutton J. stated further that this principle was applicable 'in the case at any rate of courts within the British Empire'.[10] This suggests that there may be some special significance in the fact that both the courts in British India and England, as well as the parties to the action were subject to the same political sovereignty. In *Harris* v. *Taylor*, Bray J. expressed his agreement with the decision in *Phillips* v. *Batho* and observed that 'it is clear that Scrutton J. must have held that where husband and wife were domiciled and resident in India, the courts here would not entertain a petition for damages against the co-respondent'.[11] As already noted, the Court of Appeal in *Harris* v. *Taylor* expressed no opinion on this point.

In *Jacobs* v. *Jacobs and Ceen*, Pilcher J. observed of the points just discussed in *Phillips* v. *Batho* and *Harris* v. *Taylor* that 'in neither case was there anything that Scrutton J. said or that Bray J. said necessary for a decision of the case with which they were dealing'.[12] With respect, it is doubtful whether this is true of Bray J.'s decision. What constitutes the *ratio decidendi* of a case is a source of perennial dispute, but Bray J. clearly stated that his interpretation of section 33 of the Matrimonial Causes Act, 1857, was an alternative ground for his decision. This interpretation of the section follows, and is based on the opinion of Scrutton J. in *Phillips* v. *Batho* that the personal remedy in damages is ancillary to the suit for dissolution.

It may be asked then whether there is any support for the views expressed by Scrutton and Bray JJ. In the first place, there is great force in the statement of Pilcher J. in the *Jacobs Case* that the words of section 33 of the Matrimonial Causes Act and section 189 of the Supreme Court of Judicature (Consolidation) Act do not warrant the interpolation of a requirement of domicile within the

[9] At p. 32.
[10] At p. 32.
[11] 111 L.T. 564, 568–9.
[12] [1950] 1 All E.R. 96, 99.

jurisdiction in order to permit a petitioner to bring an action for damages against a co-respondent within the jurisdiction. Moreover the argument that the personal action is merely ancillary seems to be met by the unequivocal words of Sir Samuel Evans P. in *Rayment* v. *Rayment*.[13] In that case, a co-respondent, domiciled in Scotland and served there in accordance with the provisions of section 42 of the Matrimonial Causes Act, 1857, argued that he was not subject to the jurisdiction of the English court. This defence was rejected. The learned President pointed out that there was no doubt that the Legislature of the United Kingdom had power to provide that service might be effected in any manner and in any place. Further Sir Samuel Evans said:

> 'The claim against the co-respondent is merely a money claim, a personal claim, or, as it is sometimes called, a transitory claim. *There is no complication arising from questions of international law, as there is where the status of persons under marriage laws is concerned.*[14] Any judgment of the court (apart from a possible extension to Scotland or Ireland, as hereafter pointed out) would not be executed or attempted to be executed in any foreign country'.[15]

What this means is very clear. In the first place, it is evident that the learned President separated the personal action for damages from the suit for dissolution, which as an issue involving status, raised consequent jurisdictional complications. Secondly, his point was that if pursuant to an Act of Parliament, the court took jurisdiction *in personam* over an absent co-respondent, the judgment which followed would not, on ordinary principles of jurisdiction, be enforced as a valid foreign judgment outside England. This was probably subject to qualification in the case of Scotland and Ireland because of the peremptory provisions of the Judgments Extension Act, 1868.

In *Phillips* v. *Batho*, Scrutton J. cited the judgment in *Rayment* v. *Rayment*. However, Scrutton J. seems to have failed to recognise that *Rayment* v. *Rayment* was against him on the point that the action for damages was a separate, independent personal action, and where brought against an absent co-respondent under the terms of some peremptory statutory provision, was not in general entitled to recognition elsewhere as a valid foreign judgment. Moreover, the proposition that the action for damages is a separate and not an ancillary action derives further support

[13] [1910] P. 271.
[14] Italics supplied.
[15] [1910] P. 271, 290

from the judgment of Hill J. in *Kent* v. *Atkinson*,[16] also cited by Pilcher J. in *Jacobs* v. *Jacobs and Ceen*. In *Kent* v. *Atkinson*, section 33 of the Matrimonial Causes Act was again under consideration. Proceedings for divorce on the ground of adultery had been instituted against a wife who died before a decree was pronounced. It was held that the personal action for damages against the co-respondent might nevertheless be proceeded with. As Hill J. said :—

> ' There is no doubt that under section 33 the husband can bring a petition for damages as an independent proceeding and not merely as a proceeding ancillary to a petition for divorce or judicial separation. The section expressly so provides '.[17]

In this case, neither *Phillips* v. *Batho* nor *Harris* v. *Taylor* appears to have been cited to the court.

On the authorities, therefore, it is submitted that it was clearly open to Pilcher J. to hold that the action for damages now provided for in section 189 of the Supreme Court of Judicature (Consolidation) Act, is a personal action in the nature of a tortious action, entirely independent of the suit for dissolution or judicial separation. Apart from the authorities it is respectfully submitted that Pilcher J.'s reading of the words of the sections is a ' plain meaning ' interpretation, whereas it is difficult to say the same of Bray J.'s reading. It follows then that an action for damages for adultery will be governed by the ordinary tort rules of the Conflict of Laws.[18]

Since *Phillips* v. *Batho* was cited by Pilcher J. in the *Jacobs Case*, a word may perhaps be said in conclusion about that case. The decision of Scrutton J. in *Phillips* v. *Batho* is stated in *Dicey* as a sub-rule to rule 71.[19] The learned editor of *Dicey* expresses doubts about the correctness of the decision, however, and refers with apparent approval to the criticism levelled against *Phillips* v. *Batho* by Professor Read.[20] Read challenges the doctrine that the personal action for damages is ancillary to the suit for dissolution, and pertinently observes that the doctrine is out of harmony with the otherwise consistent insistence in actions *in personam* on a more direct relationship between the person and the law district. With particular reference to the *ancillary* element, Read remarks that it has been established that ownership of property situated within a law district does not ground jurisdiction *in personam*.

[16] [1923] P. 142.
[17] At pp. 147–8.
[18] See *Dicey* (6th ed., 1949), pp. 799 *et seq.*
[19] P. 373.
[20] *The Recognition and Enforcement of Foreign Judgments* (1938), pp. 262 *et seq.*

Why then should a decree of dissolution of marriage by a court having jurisdiction to make such a decree ground jurisdiction *in personam* over an absent non-consenting co-respondent, so as to entitle a judgment based on such jurisdiction to recognition as a valid foreign judgment? To the present writer, Read's point is unanswerable. Moreover, Scrutton J.'s possible limitation of his principle to courts subject to the same sovereign is altogether surprising, and, it is submitted with respect, not at all desirable, for it introduces a peculiarly political qualification. Read further points out that *Phillips* v. *Batho* has been ignored in New Zealand and Canadian decisions. What the decision creates is 'a hybrid obtained by crossing an action *in rem* with an action *in personam* with the dominant jurisdictional characteristic being possessed by the former'.[21] It is to be hoped that when, and if, the question arises again for decision in the courts, the doctrine of *Phillips* v. *Batho* will be disapproved.

Adoption under English and German Law

Since the occupation of Germany by the Allied Powers, the question has sometimes been asked whether a German child could lawfully be adopted by an Englishman serving with the British Military Government in Germany. The well-known Professor of International Law at the University of Hamburg, Dr. Leo Raape, has examined this question in an article published in the November issue of the *Monatsschrift fuer deutsches Recht*, 1948, in which he comes to the conclusion that such an adoption could indeed be effected in Germany and would also be recognised in England.

This conclusion cannot be accepted. On the contrary, it will be shown that an adoption in the described circumstances would not be allowed in Germany and in any case would have no legal effect in England.

Criticism is immediately invited by the way in which Raape proceeds with his investigation. He starts by examining the question whether the act of adoption is to be performed by the English or German court. The jurisdiction of the English court he denies for the reason that under section 2 (5) of the Adoption of Children Act, 1926, an adoption order may not be made in respect of an infant who is not a British subject and who is not residing in England or Wales, whereas the jurisdiction of the German court is affirmed on the ground that the adopter, though domiciled in England, is staying in Germany, and that the judicial confirmation

[21] Read, *op. cit.*, p. 264.

of a contract of adoption[1] is, by virtue of section 66 FGG,[2] the responsibility of the court in whose district the adopter is resident or staying.

It is by no means, however, the question of jurisdiction from which we have to proceed in our considerations, nor is Raape's answer to that question based on sound arguments. It is true that the judicial sanction of the adoption could, in the circumstances, only be pronounced by a German court, but the reason for this is not to be found in section 2 (5) of the English Adoption Act, which is not, as will be shown later, a rule of procedure but a rule of substantive law, nor can it be inferred from section 66 FGG which merely regulates the local competence of the individual courts within Germany and has nothing to do with the determination of international jurisdiction.[3] The jurisdiction of the German court simply results from the intention of the parties that the adoption should be effected in Germany. The confirmation of an adoption by the court is not a function of civil litigation, not a decision in contentious proceedings, where the court of one country may have to adjudicate on transactions which took place in another country, but an act of non-contentious jurisdiction, namely, the co-operation of the court in the making of a private contract, and this co-operation implies that the court which is to confirm the transaction can, prima facie, only be a court of the country in which the transaction is to take place.

One prior condition must, of course, be fulfilled before the court can act, that is, the proposed adoption must be legally possible, and in order to be able to establish that point it is first of all necessary to determine the law by which the adoption is governed. It is this question, the question of the choice of law, with which we have to deal in the first instance. The question of the governing law, however, is in no way affected by the nationality of the confirming court, which may have to apply such law, either domestic or foreign, as is exclusively determined by the international rules of conflict.[4] Under the German rules, from which we

[1] Under German law an adoption is completed by a private agreement between the two parties, the agreement being subject to confirmation by the court. For further details regarding this difference between English and German law see below.

[2] FGG—Gesetz betr. die Angelegenheiten der freiwilligen Gerichtsbarkeit (Law concerning matters of a non-contentious jurisdiction).

[3] Raape, in his *Internationales Privatrecht* (hereafter cited as *Staudinger-Raape*), p. 596, takes the contrary view without, however, giving any reasons.

[4] For similar considerations see Cheshire, *Private International Law* (3rd ed.), pp. 522, 523, in particular the following passage: 'The substantial inquiry is, not whether the official, if any, who effected the adoption possessed jurisdiction in the international sense, but whether the legal system under which the status has been created has a paramount claim to govern the matter'.

proceed because it is in Germany that the adoption is to be completed, an adoption is governed by the law of the country of which the adopter is a national (Art. 22 EGBGB),[5] that means that the adoption in our case is governed by English law, provided that English law does not apply the renvoi, in which case German law would have to be applied.

Raape asserts such a renvoi to German law, but in this case there is nothing in the English rules of conflict to support that proposition. The normal case of a renvoi from English to German law is the case where an Englishman is domiciled in Germany, and the German conflict rules (based as they are on the nationality principle) refer to English law whereas the English conflict rules (in their turn based on the domicile principle) refer to German law. There might be a renvoi, therefore, if the adopter in our case were domiciled in Germany, but it is common ground that his domicile is still English as it could not, of course, be affected by his temporary employment with Military Government in Germany. So the domicile principle does not afford a basis for Raape's proposition, as Raape admits himself, but neither is there any other general principle of English law from which a renvoi could be inferred. It is obviously for this reason that Raape relies exclusively on the provision of section 2 (5) of the Adoption of Children Act which he attempts to construe so as to imply a renunciation of jurisdiction on the part of England so comprehensive as to amount to a permission to Germany to effect the adoption on her part. This proposition cannot be accepted. Even assuming that all the arguments adduced by Raape in this respect were sound, that is, if really it were 'the underlying idea of this provision that, if the adoption could not be effected by the English authority because of the absence of the conditions defined in the provision it must be open to the respective foreign country to effect the adoption on its part', if really it were 'the view of the English legislator that the adoption of a foreign child did not come in any way within the province of English law', and if really 'England did not concern herself with the adoption because the child was not of British nationality and had no English residence', yet all these arguments lack the one thing that matters: a reference to German law. For a renvoi, by its very essence, requires that it is voiced, that the legal system which wishes a specific set of facts submitted to itself to be governed by a different system of law must say so positively and intelligibly. Otherwise there

[5] EGBGB—Einfuehrungsgesetz zum Buergerlichen Gesetzbuch (Introductory Law to the German Civil Code).

is no renvoi. Mere silence, mere passivity, even positive self-elimination will not suffice. 'If in accordance with the law of a foreign country', says Article 27 EGBGB, which deals with the renvoi, that is, if in accordance with the *expressed will* of that law, 'the German laws' (not, any foreign laws) 'are to be applied' etc. So there cannot be any doubt that where there is no reference to an identifiable foreign law there can be no renvoi. Consequently, as section 2 (5) of the Adoption of Children Act contains no reference whatever it cannot be used as a vehicle for a renvoi, which means that the adoption in the case under review is governed by the substantive rules of English law.

Accordingly, the German court to which the contract of adoption is submitted for confirmation, or rather the legal advisers of the parties concerned (before they go to the court), will have to determine whether the proposed adoption is permissible under English law and whether all conditions upon which English law makes the authorisation of an adoption dependent are fulfilled.

In order to be legally effective, an adoption under English law also requires an order of the court. The court must authorise the adoption. But there is an essential difference between this authorisation of the adoption under English law and a confirmation under German law. The latter is merely a formal sanction by the court of a private contract, the terms of which are entirely left to the discretion of the parties. It cannot be refused by the court except in certain specific circumstances and otherwise is conditional only upon all formal requirements being fulfilled. The authorisation under English law, on the other hand, is a constitutive act of the court by which the state of adoption in a particular case is created. Moreover, the parties cannot claim this authorisation as of right. On the contrary, it is left entirely to the judicial discretion of the court, which in exercising this discretion does not confine itself to an examination of the formal conditions but has to make a full inquiry into all the circumstances of the case and must satisfy itself that the adoption will serve the best interests of the child, and that the parties concerned, particularly the natural parents of the child, fully understand the meaning and the consequences of the adoption. The court also has power to attach conditions to the authorisation.

Now it is in this very kind of case, *viz.*, in cases where the governing foreign law demands (as English law does) an examination extending beyond the mere formal conditions, that the Kammergericht [6] has laid down the principle that the German court may

[6] The Supreme Court of Appeal for Prussia.

not pronounce a confirmation but has to refuse it.[7] It considers that the jurisdiction of the German courts in respect of adoptions has been restricted by sections 65, 66, FGG, to the functions specified in sections 1741, 1754, German civil code, and has maintained this view even after, by an amendment of November 23, 1933, the powers of the court under section 1754 had been extended.[8]

The view of the Kammergericht has been vigourously criticised by Raape in his *Internationales Privatrecht*.[9] He challenges the inferences drawn by the Kammergericht from sections 65, 66, FGG, though without giving any reasons for the challenge, and claims that the German courts are very well in a position to undertake the investigations prescribed by English law and also to decide on the sanction of the adoption according to their judicial discretion.

It must be admitted that it is not, indeed, the meaning of sections 65, 66, FGG, which merely regulate the delimitation of the local jurisdiction of the courts, that they should also determine the nature and scope of their functions. On the other hand, Raape's proposition confronts the German judge with questions which it will hardly be possible for him properly to assess from a foreign country (as for example the domestic conditions of the adopter in the present case) or—as is only natural in connection with the creation of such an intimate bond as is the relationship between parent and child—with questions of a religious or ideological nature, in respect of which there may perhaps be fundamental differences of opinion between the two countries concerned. Not infrequently will the German judge, in cases in which the foreign court would, from its more comprehensive knowledge of the actual conditions have authorised the adoption, be bound to refuse authorisation because under English law he may not authorise an adoption unless he is satisfied also on his part that the adoption is reasonable and in the best interest of the child, and it may well be on account of the geographical situation of his court that he could not gain that satisfaction. On the other hand he is just as often likely to run the risk that a confirmation pronounced by him will not be recognised by the foreign country concerned. As a matter of principle, therefore, the question must be asked whether it is possible at all for the conditions required under English law to be fulfilled in the German procedure, whether a confirmation under the German system can ever be a proper substitute for the authorisation under the

[7] *Decisions of the Oberlandesgerichte*, vol. 42, p. 188; vol. 46, p. 189.
[8] Decision of September 6, 1935. *Juristische Wochenschrift*, p. 3481.
[9] *Staudinger-Raape*, p. 597 *et seq.*

English system, and whether these considerations alone should not be a sufficient reason for the German court to abstain from granting a confirmation.

If Raape demands a 'gentlemanly' interpretation of the domestic provisions regarding jurisdiction in the field of private international law and complains that 'the passive resistance of the German courts was likely even to embarrass the foreign country',[10] the point should not be lost sight of that nothing will be gained by the German courts making orders which are refused recognition abroad, perhaps by the very country whose law they have to apply under the German rules of conflict.

In his article in the *Monatsschrift*, Raape expressly maintains his criticism of the attitude of the Kammergericht, but then puts forward a most startling proposition. 'However that may be', he says,[11] meaning his controversy with the Kammergericht, 'in the present case the adoption is effected by reason of the renvoi in accordance with domestic law and it is under domestic law that the court has the duty to inquire also into the surrounding circumstances'. So far the whole controversy turns upon the point that the German court has, under German law, only to examine the formal conditions and that it is doubtful whether it has the power and the ability to undertake in addition the more extensive investigations prescribed by English law. But now it is suddenly contended that these more extensive investigations are prescribed by German law. Of course they are not, as clearly appears from the text of the German civil code. And if there really were a renvoi (which is denied) the whole problem of these wider investigations would not arise since in that case German law would apply and under German law, as has been stated over and over again, examination of the formal conditions would suffice.

If the German court in the present case follows the view of the Kammergericht—and having regard to the high authority which this court enjoys, the majority of German courts will as a rule do so—it will have to refuse to confirm the adoption without going into the question whether or not it is permitted under English law.

An eminent authority in the field of family law, the late Professor Kipp, of Berlin University, goes even one step further than the Kammergericht by declaring a confirmation by a German court of an adoption governed by foreign law in accordance with Art. 22 EGBGB as absolutely impossible whenever the foreign law subjects the adoption to State sanction, irrespective of whether this

[10] *Ibid.*, pp. 598, 599
[11] P. 384, col. 2.

sanction only requires an examination of the formal conditions, or of the surrounding circumstances in addition. 'The confirmation required by the law of one country', he says, 'cannot be replaced by the confirmation by a different country. It is a question of the jurisdiction of the State, which has nothing to do with the local jurisdiction of the courts.' This view, in addition to being supported by better arguments than that of the Kammergericht, has also the advantage that it satisfies the practical requirements of Private International Law by contributing towards a reduction of the risk that the courts of different countries may arrive at conflicting decisions on the same question. The members of the Reichsgericht in their Commentary to the German Civil Code (Note 6 before section 1741) associate themselves with Kipp's view, and even Raape once made a statement in his *Internationales Privatrecht*,[12] which in effect amounts to a confirmation of Kipp's view at least in so far as countries are concerned under whose law the basis of the adoption is not a contract (as under German law) but an act of the court or some other authority. In respect of such countries (and among them he expressly mentions England) he says that they must be presumed to claim exclusive jurisdiction. Under their system, he continues, the confirmation[13] of the adoption must be treated on the same footing as the *legitimatio per rescriptum principis* which is the exclusive right of the country of which the father is a national. Raape does not, however, appear to adhere to this view any longer, or at least he does not in his article in the *Monatsschrift*.

But even if one were to follow Raape and allow the confirmation of the adoption by a German court also in cases where the governing foreign law demands a full examination of the surrounding circumstances of the adoption, there could still be no adoption in Germany in the present case for the reason that it would be contrary to section 2 (5) of the English Adoption of Children Act, which reads as follows :

> 'An adoption order shall not be made in favour of any applicant who is not resident in England or Wales and who is not domiciled in England and Wales or Scotland, or in respect of any infant who is not a British subject and who is not resident in England or Wales'.[14]

[12] *Staudinger-Raape*, p. 597.

[13] In fact there is no 'confirmation' in the proper sense under this system, as explained above.

[14] On p. 523 of Cheshire's *Private International Law*, where the contents of this subsection are rendered, a misleading printing error appears to have crept in inasmuch as in the phrase 'unless the adopter is resident in England or Wales, *or* domiciled in England, Wales or Scotland', the 'or' before 'domiciled' should correctly read 'and'.

As the child in the case under review is not a British subject and not resident in England or Wales, English law would not allow an adoption, and as English law is the governing law, there cannot be an adoption in Germany either.

Raape regards this provision not as a rule of substantive law, that is, not as a rule which the German court would have to apply, but, as mentioned before, as a procedural rule which exclusively determines international jurisdiction. The provision may in fact have practical consequences extending also to the sphere of international jurisdiction, but essentially it is a substantive rule. One must not, of course, allow oneself to be misled by the English terminology which frequently, and so also here, clothes a rule of substantive law in a rule of procedure in that it states, not under what conditions an adoption is allowed or not allowed, but under what conditions an adoption order may or may not be made, which in effect of course amounts to the same thing. The statutory provision by which adoption was introduced in England is also worded in this language. Section 1 (1) of the Adoption of Children Act reads as follows :

> ' Upon an application . . . by any person desirous of being authorised to adopt an infant . . . the court may, subject to the provisions of this Act, make an order (in this Act referred to as " an adoption order ") authorising the applicant to adopt that infant '.

Nobody would try to construe this provision otherwise than to mean that adoptions may now be lawfully effected in England in accordance with the provisions of this Act. It would not be taken as merely regulating the procedure. And the same applies to section 2, in which are set out the conditions under which an adoption may not take place, and these conditions are all placed on the same level, no distinction being made in particular between subsection (5) and the other subsections. So there would be no difference between the case where an adoption order may not be made because the child is not a British subject and the case where it may not be made because there is not the proper relation between the ages of the two parties.

Similarly, language used by legal writers, such as ' the court has jurisdiction (or has no jurisdiction) to make the order ' [16] must not be taken to mean that the character of section 2 (5) as a substantive rule should thereby be denied. This is evidenced by the fact that in order to express the same thing phrases are also used which clearly express the character of the subsection as a

[16] Wolff, *Private International Law* (1945), p. 407.

substantive rule, phrases such as 'the adoption is applicable only to children of British nationality and can be carried out only by persons resident and domiciled in England'[17] or 'power to adopt is restricted to children of British nationality'.[18] Accordingly, Cheshire's statement 'the Act restricts the jurisdiction of the English courts by requiring a combination of nationality and residence'[19] cannot be understood to mean a denial of the substantive character of the rule either; it simply points out the narrow limits that are drawn to the power of the courts to make adoption orders by these particular requirements in respect of nationality, domicile and residence, though the context shows that the author had in mind just the effect on the powers of the English courts.

If, accordingly, section 2 (5) must clearly be understood to be a substantive rule, this means that it has to be applied by the German judge who has to apply English law in the same way as by an English judge, with the above-stated result, that is, the German judge has to refuse confirmation of the adoption on account of the German nationality and German residence of the child just as the English judge would, for the same reasons, have to refuse an adoption order if an application for such order were brought before him. Likewise (contrary to what Raape points out on p. 383, col. 2), in a case of litigation in England in which the validity of the adoption in Germany (assuming it had been confirmed) were at issue, the English judge would also have to apply the said subsection (5) and accordingly refuse recognition.

At any rate, whatever the character of section 2 (5) may be, be it a substantive or a jurisdictional or a mixed rule, one thing is certain, that is, the rule does not allow of the above-mentioned far-reaching inferences which Raape tries to draw from it and which would amount to a blank cheque for the recognition by the English legal system of any adoption effected abroad which would not be allowed in England on account of the said subsection. There is nothing in the Act to support such inferences, but their principal defect is that they completely disregard the rules of the common law, which in fact are not even mentioned in the whole of Raape's article. It is, however, primarily the common law from which the answer to our problem will be supplied.

In order to be able fully to appreciate the attitude of the English law towards adoption, especially so far as foreign adoptions are concerned, a short survey of the position as it was before the coming into force of the Adoption Act, will be useful. At that time

[17] Dicey, *Conflict of Laws* (5th ed.), p. 554.
[18] *Ibid.*
[19] *Op. cit.*, p. 523.

adoption was altogether unknown in England, and foreign adoptions therefore came under the common law rule that a status created under foreign law which is of a kind unknown to English law has no legal effect in England.[20] A foreign adoption was denied recognition even when it was permitted and legally effective, both under the law of the domicile of both parties and under the law of the country in which it had been completed.[21] The attitude of the common law towards adoption was accordingly rather more hostile than, for example, towards *legitimatio per subsequens matrimonium* which until the Legitimacy Act, 1926, was also unknown to English law, but was at least recognised by the common law in so far as the subsequent marriage had legitimating effect both under the law of the domicile of the father at the time of the marriage and the law of his domicile at the time of the birth of the child. There was no such exception in respect of adoption.

The Adoption of Children Act, 1926, brought about a fundamental change in this state of the law inasmuch as the adoption was now no longer a status unknown to English law and consequently, when effected abroad, could no longer be denied recognition as a matter of principle as had been the case under Dicey's Rule 136. But the Act was silent as to the extent to which recognition was now to be allowed, and it may have been this silence, coupled with the fact that the Legitimacy Act, which was passed in the same year and deals with a kindred subject, does contain provisions regarding the recognition of foreign law, which prompted Martin Wolff's remark, that 'one may even doubt whether such recognition is allowed today'.[22] These doubts are unfounded. The aforementioned difference between the Adoption Act and the Legitimacy Act is easy to explain and has no particular significance. The inclusion in the Legitimacy Act of provisions regarding the recognition of foreign legitimating marriages was apparently due to the fact that the extent to which the legitimating effect of subsequent marriages had been recognised under common law has been widened by the Act, which consequently had, of necessity, to express itself on that point. The situation was different with regard to adoption. As far as the principle was concerned, recognition became lawful simply as a result of the removal of the old ban embodied in Dicey's Rule 136; there was no need for an explicit enactment to that effect. And as regards the extent of the

[20] Dicey, Rule 136: 'Transactions taking place in England are not affected by any status existing under foreign law which is of a kind unknown to English law'. See also Schmitthoff, *A Textbook of English Conflict of Laws*', 1945, p. 269.

[21] See the examples quoted by Dicey, pp. 533 (i), 535

[22] *Op. cit.*, p. 408.

recognition it did not require statutory regulation either because there was already a rule at common law which settled this question in a most satisfactory way, and incidentally on virtually the same lines as the parallel problem in regard to subsequent marriages has been settled by the Legitimacy Act. It is the common law rule that the status of a person is governed by the law of his domicile and that consequently the status of a person domiciled in England cannot be changed under a foreign law and under the jurisdiction of a foreign court.[23] According to this rule recognition of a foreign adoption will have to be refused in all cases where any one of the two parties to it, either the adopter (as in the case under review) or the child, is domiciled in England.[24] Recognition will further have to be refused where the foreign adoption is either not allowed at all or not valid under the foreign law under which it has been completed, foreign law in this sense to include English law as far as this is declared applicable by the conflict rules of the respective foreign law. In all other cases recognition will probably be granted, that is primarily in such cases where the foreign law under which the adoption takes place is the law of the domicile of the two parties.[25] These will frequently be cases of genuine renvoi.

For the sake of completeness the further question might be raised (though it has no bearing on the case under review) whether in view of the purpose of the Act, which quite obviously is primarily concerned with the protection of the child, recognition should not also be refused in the case where the child is a British subject, even when neither party is domiciled in England. Wolff [26] answers the question in the affirmative whilst Cheshire [27] leaves it open.

There is no direct decision of a court of law on the question of the recognition of foreign adoptions, but the principle that the status of a person domiciled in England may not be altered under a foreign law has more recently (in 1940) again been confirmed by the Court of Appeal in the case of *Re Luck's Settlement Trusts*.[28]

[23] Cheshire, p. 482; Dicey, pp. 532, 538, note (f); Martin Wolff, p. 407 *et seq.* Decision of Court of Appeal in *Re Luck's Settlement Trusts* (see below).

[24] Cheshire, p. 522; Martin Wolff, p. 407 *et seq.* Dicey and Schmitthoff do not comment on the question.

[25] Cheshire, p. 524: 'The adoption alters the status of both parties, and therefore to attract extraterritorial validity it must be valid according to each *lex domicilii*'. The Adoption Act does not strictly adhere to the domicile principle inasmuch as it allows the adoption in England of a British child resident in England but not domiciled there: s. 2 (5). Of course there are countries where the domicile of the child is irrelevant and the governing law is only determined by the personal law of the adopter. So Germany, Austria, Switzerland, Denmark, Poland, and others.

[26] *Op. cit.*, p. 408.

[27] *Op. cit.*, p. 524.

[28] [1940] Ch. 864. Cheshire's criticism of this decision is not directed against the governing principle but against certain aspects of the decision which leave this principle entirely unaffected. *Op. cit.*, pp. 518 *et seq.*

So it is quite manifest that English law still watches jealously over any alteration of the status of a person domiciled in England and shows no trace of such self-effacement as Raape has been trying to establish. What Raape describes as by no means following from the Adoption Act, namely that 'England would never allow a person domiciled in England to adopt a foreign child', is indeed a principle of English common law, though it cannot fairly be said that with a little good will it could not also have been gathered from the Act itself. And indeed it is also the 'wish' (though not of the 'English legislator' in the sense of the author of the statutory law) of English common law, that a German domiciled in England should not be entitled to adopt a German child. Such an adoption would of course be allowed in Germany where the nationality principle prevails, but it would never have any legal effect in England. Raape apparently considers this state of the law to be unsatisfactory, but it is plainly the effect of the extraordinary importance which English law, unlike German law, attaches to the domicile of a person particularly as far as questions pertaining to his status are concerned. In this respect domicile enjoys the same significance under English law as nationality enjoys under German. And if one considers all the other differences between the two systems in regard to the law of adoption—a court order as the basis of the adoption in England against a private agreement in Germany, tests by nationality, domicile and residence in England which are quite unknown in Germany, applicability to German adoptions of foreign law against complete elimination of foreign law in regard to adoptions effected in England—one should not be surprised if in cases where the two systems compete results will occur that may seem strange or unsatisfactory. But these results must be accepted, especially when domestic law itself prescribes the application of foreign law; it is no good trying, by artificial constructions, forcibly to shape the foreign law according to one's own conceptions. The only effective remedy would be afforded by the conclusion of international agreements such as have been concluded in other fields of the law.

The result of our investigation may accordingly be stated to be that in the described circumstances an adoption is not legally possible either in England or Germany and would certainly not be recognised in England.

Hugo Löhning.[29]

[29] Hamburg, Germany.

[Note.—Since this note was written, section 2 (5) of the Adoption Act has been amended by section 1 (2) of the Adoption of Children Act, 1949. Under the new provision it is possible for an adoption order to be made in respect of a child who is not a British subject. The requirement of residence in England or Wales is retained, however, so that Dr. Löhning's argument in the case under review is not affected. Editor.]

United Nations: Notes on the General Assembly's Fourth Session

I

United Nations Flag in Trust Territories

On November 15, 1949, the General Assembly passed a Resolution which requested 'the Trusteeship Council [1] to recommend to the Administering Authorities concerned that the flag of the United Nations be flown over all Trust Territories side by side with the flag of the Administering Authority concerned and of the territorial flag if there is one'. The United Nations flag was adopted by the General Assembly in Resolution 167 (II) of November 20, 1947, which directed the Secretary-General to draw up regulations concerning the dimensions and proportions of the flag, and authorised him to 'adopt a flag code having in mind the desirability of a regulated use of the flag and the protection of its dignity'. The Secretary-General promulgated a Flag Code [2] on December 19, 1947, the relevant sections of which are the following :—

3 (i) The flag of the United Nations shall not be subordinated to any other flag.

4 (i) The flag shall be flown :—

(a) from all buildings, offices and other property occupied by the United Nations;

(b) from any official residence when such residence has been designated by regulation.

(ii) The flag shall be used by any Unit acting on behalf of the United Nations such as the Military Staff Committee and any committee or commission or other entity established by the United Nations in such circumstances not covered in this Code as may be necessary in the interests of the United Nations.

8. The flag shall not be used except in accordance with this Flag Code and any regulations made pursuant thereto.

The Flag Code also provides for the making of regulations by the

[1] The form of the resolution is peculiar. What is the difference between a recommendation by the General Assembly and one by the Trusteeship Council at the request of the General Assembly? The Trusteeship Council is no doubt bound by Article 85 (2) to carry out the request, and since it could not make the recommendation *proprio motu* (Articles 87 and 88 contain no power of recommendation) the resolution is doubtless to be regarded as a recommendation of the General Assembly conveyed to the Administering Authorities by the Trusteeship Council, acting more or less as postman.

[2] This Flag Code has not been challenged or criticised by any Member of the United Nations and in view of the wide terms of Resolution 167 (II) it is not easy to see how it could be.

Secretary-General or his duly authorised representatives. In regulations made on July 23, 1949, it is provided that the United Nations flag shall be flown on the following buildings : Permanent or interim headquarters; United Nations Branch Offices; United Nations information centres; buildings and places in which any United Nations Organs, Commissions and Committees are meeting.

A national flag is a symbol of authority but not necessarily of sovereignty, though it appears that a sovereign State may forbid the flying of a foreign flag in its territory,[3] and that the right to fly the national flag[4] granted to foreign vessels and foreign missions is one of customary concession rather than of law.

A trust territory is not under the sovereignty of its administering authority nor is it part of its territory, but it seems reasonable to suppose that the administering authority may not only fly its own national flag in the territory but has the same right as a sovereign to forbid the flying of a flag in the trust territory symbolising an authority foreign to the territory. But is the United Nations an authority ' foreign to the territory ' ? Article 75 of the United Nations Charter begins: ' The United Nations shall establish under its authority an international trusteeship system for the administration and supervision of such territories as may be placed thereunder by subsequent individual agreements '. The question then arises, does ' international trusteeship system ' refer only to the constitution and system of supervision of the trust territories, that is to say, the trust agreements and the Trusteeship Council and its subsidiary bodies and the relations between the United Nations and the administering authorities, or does the expression include the trust territories themselves ?

In favour of the first view it may be said that the expression is nowhere used in a sense which must include the trust territories as such. Thus Article 76 speaks of the ' basic objectives of the trusteeship system ', Article 77 (1) declares that the ' trusteeship system shall apply to such territory . . . as may be placed thereunder ' and Article 78 uses similar language of exclusion; while Articles 79 and 80 speak of territories ' placed under the trusteeship system '. Therefore the Charter does not directly grant authority over the trust territories themselves to the United Nations; its authority is by Article 75 extended over ' the trusteeship system ' which is a constitutional and not a territorial concept. But it does not follow that the United Nations has no derivative authority in the territories themselves; it may send

[3] Hyde, *International Law*, Vol. 1 (2nd edition), p. 696.
[4] Oppenheim-Lauterpacht, *International Law*, Vol. 1 (6th edition), p. 755.

missions of inspection, which, in fact, *must* fly the United Nations flag under paragraph 4 (ii) of the Flag Code when working as a unit, *e.g.*, on their vehicles, and, under the regulations, upon buildings where they meet; it governs the 'alteration or amendment of trust agreements'[5] and supervises the trust territories generally. It may be said in short that under Article 75 the 'administration' rests solely with the Administering Authority, while 'supervision' rests with the United Nations, and that this confers an authority sufficient to justify the flying of the United Nations flag in the trust territories.

To sum up:

(1) a trust territory is not under the sovereignty of the Administering Authority or the United Nations but the Administering Authority may fly its national flag as the symbol of its authority in the territory;

(2) the United Nations flag must be flown by United Nations Missions in trust territories;

(3) the United Nations has authority in trust territories, parallel to that of the Administering Authority, sufficient to justify the flying of its flag there otherwise than under (2).

II

Admission of New Members

The General Assembly resolution of November 22, 1949 (United Nations Document A/1123) on the admission of new Members to the United Nations proposed that the following question be put to the International Court of Justice for an Advisory Opinion:—

> 'Can the admission of a State to membership in the United Nations, pursuant to Article 4, paragraph 2, of the Charter, be effected by a decision of the General Assembly when the Security Council has made no recommendation for admission by reason of the candidate failing to obtain the requisite majority or of the negative vote of a permanent Member upon a resolution so to recommend?'

An Advisory Opinion was sought to quieten doubts which have been raised, mainly by the Argentine Delegation, as to the meaning of Article 4 (2) of the Charter.[6] On June 24, 1949, Dr. Arce, the permanent representative of the Argentine to the United Nations,

[5] Articles 79 and 85; the United Nations cannot terminate a trust agreement thereby annulling the trusteeship.

[6] 'The admission of any such State to membership of the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.'

had presented in the Security Council [7] a long and ingenious argument which may be summarised as follows. When a State applies for admission to the United Nations the Security Council must make a recommendation under Article 4 (2) of the Charter; this recommendation may be favourable or unfavourable, there being nothing in Article 4 (2) to limit the term 'recommendation' one way or the other; since the act of the Security Council is only a recommendation, the General Assembly may accept it or reject it; where an application for admission has been defeated in the Security Council by the negative vote of a permanent Member (a veto) the Security Council is to be deemed to have made an unfavourable recommendation; it is therefore open to the General Assembly to reject this unfavourable recommendation and admit the Applicant State.

Though this argument, it is submitted, is unsound, it deserves consideration not only for its sincere purpose of breaking the deadlock on the admission of new Members but because it reveals some of the pitfalls of references to *travaux préparatoires* where the article to be construed is already clear.

The International Court has already declared that the text of Article 4 is clear and that no resort to *travaux préparatoires* is necessary in order to interpret it.[8] Further, seven judges of the Court have also expressed the opinion that the word 'recommendation' in the Charter is to be given its normal meaning.[9] Article 4 (2) makes it quite clear that the General Assembly cannot admit a State to membership unless there has been a recommendation by the Security Council. Now it can no doubt be argued that it would have been more reasonable to provide that new Members should be admitted to the organisation by the totality of existing Members, represented in the General Assembly, and that no other organ, such as the Security Council, much less a single Member, should be able to block the admission of a new Member: however that may be, the Charter in fact provides that a recommendation by the Security Council is a condition precedent to admission by the General Assembly. But can 'recommendation' in Article 4 (2) be so interpreted as to enable the General Assembly to admit a Member without the concurrence of the Security Council?

[7] Security Council Official Records, No. 32, 429th meeting.

[8] International Court of Justice, Advisory Opinion on conditions of admission of a State to membership in the United Nations, p. 63.

[9] International Court of Justice, *Corfu Channel Case* (preliminary objection) (p. 32); 'having regard to the normal meaning of the word "recommendation" a meaning which this word has retained in diplomatic language as is borne out by the practice of the Pan-American Conferences of the League of Nations, of the International Labour Organisation, etc.'.

Theoretically the Security Council can do one of four things when an application for membership comes before it:—

(1) it may advise the General Assembly to admit the State;

(2) it may suggest that the General Assembly admit it upon such conditions as the General Assembly sees fit to impose, as in the case of Austria;

(3) it may advise the General Assembly not to admit it;

(4) it may pass no resolution at all.

The central question then is, which of these steps would be a 'recommendation' for the purposes of Article 4 (2)? Now recommendation—to give it its accepted meaning—is neither on the one hand a command nor, on the other hand, a mere expression of opinion; it is a suggestion by one person or body to another person or body that they take certain action. Therefore, steps (1) and (2) are undoubtedly recommendations. Step (3) cannot be regarded as a recommendation for purposes of Article 4 (2); in the first place if the paragraph means that the General Assembly may admit an Applicant State even though the Security Council has recommended that it be not admitted then the expression 'upon the recommendation of the Security Council' becomes pointless; for the position would be that whether or not the Security Council approved of the admission the General Assembly could effect it.[10] In other words there should be either no reference to the Security Council at all or a requirement only that the Security Council should express its opinion. Secondly, the Security Council has never made an unfavourable recommendation and it would, indeed, be rather odd if it did. Its proper course where it does not approve of an applicant is to make no recommendation at all and in this respect the first step in Dr. Arce's argument is a false one. Step (4) cannot be regarded as a recommendation either; if there is no resolution there is no recommendation, and the fact that the resolution may have failed of adoption by reason of a veto, that is to say the Applicant State has the support of the majority in the Security Council but is opposed by a permanent Member, is really irrelevant. Still less can the absence of a resolution be regarded as an 'unfavourable recommendation' and it is this which is the essential step in Dr. Arce's argument; where there is no resolution it is impossible

[10] See Report of Committee I of Commission II of San Francisco Conference in Volume VIII of the records of the Conference on p. 451—'the Committee recommends that new Members to be admitted by the General Assembly upon recommendation of the Security Council. In supporting the acceptance of this principle several delegates emphasised that the purpose of the Charter is primarily to provide security against a repetition of the present war and that therefore the Security Council should assume the initial responsibility of suggesting new participating States'.

to say that there has been an unfavourable recommendation by the Council; at the most there has been an unfavourable recommendation by one permanent Member or a minority of the Council. This cannot in any circumstances be regarded as an act of the Security Council.

There is, however, a passage in the San Francisco records upon which Dr. Arce strongly relied. It is to be found in Volume VIII in the records of the Conference on p. 494 and is a quotation from the Second Report of Committee I on Commission II. It reads as follows:—

> 'The Committee was advised that the new text did not, in the view of the Advisory Committee of jurists, weaken the right of Assembly to accept or reject a recommendation for the admission of a new Member *or a recommendation to the effect that a given State should not be admitted to the United Nations*. The Committee agreed that this interpretation should be included in its minutes as the one that should be given to the Charter, and on this basis approve the text as suggested by the Co-ordination Committee'.[11]

Now, as already pointed out, the International Court considered that it was not necessary to have resort to the San Francisco records for the purpose of interpreting Article 4; the dissenting minority, however, did have resort to those records without, it must be said, giving any good reason for so doing. But even if the passage from the San Francisco records just quoted is taken into account it will be found that it does not support Dr. Arce's view. If the records of the Conference are read as a whole it will be found that the Advisory Committee of jurists in making this observation on what is now Article 4 (2) were concerned only to say that the Assembly was in all cases to be entitled to express itself on the question of admission or non-admission whether the Security Council had recommended admission or not. In other words, the words 'accept or reject' in the third line of the passage should be read as equivalent to 'agree or disagree with', the intention being that the General Assembly should not be precluded from discussing and expressing an opinion on the admission of a particular Applicant State whatever the attitude of the Security Council might have been upon it. This, of course, has been in fact the practice. It is unfortunate that this passage from the San Francisco records should be itself so obscurely worded and therefore subject to doubt as to its meaning. It was drafted very hurriedly in the last stages of the Conference and there is no evidence that Commission II of the Conference when taking Committee I's report ever considered this

[11] Italics supplied.

matter in detail at all. Indeed this passage and the use which has been made of it should stand as a warning against too free use of *travaux préparatoires*. But if one passage in the San Francisco records is resorted to it is permissible to quote others, and the records of Committee I of Commission II make it abundantly clear that it was the intention at San Francisco that the Security Council and the General Assembly should have equal standing in the matter of the admission of new Members and that no State could be admitted unless both bodies had expressed themselves in its favour. It might be added that in the Advisory Opinion on the conditions of admission to membership the dissenting judges, though they had cited the passage already quoted from the San Francisco records, did not interpret it in a way favourable to the Argentine argument.[12]

In conclusion, the meaning of Article 4 (2) is clear and resort to the San Francisco records is unnecessary; if such resort is had the records confirm the natural interpretation—namely, that the word 'recommendation' has its normal meaning and that the General Assembly cannot admit a State to membership upon which the Security Council has made no recommendation or has made an adverse recommendation.

J. E. S. Fawcett.[13]

The Present Status under the New Indian Constitution of Indian Citizens within the British Commonwealth

This note must not be taken as finally authentic as the full effect in the British Commonwealth of the new Constitution of India on Indian nationality and citizenship is not yet fully appreciated.

The effect of the new Indian Constitution on the foreign aspect of Indian citizenship is chiefly contained in the India (Consequential Provision) Act, 1949, and the provisions concerning citizenship in the new Indian Constitution, *i.e.*, Articles 5–11, 18, 102, 191, 367 (3) and 392 (3). The latter provisions of the Constitution do not constitute a complete citizenship law and Article 11 indicates that further legislation by the Indian Parliament is contemplated.

Under its new constitution India became a Republic (and

[12] See Advisory Opinion, p. 90—'Nor can the significance of the word "recommendation", in para. 2 of Article 4, be overlooked. It is the function of the Security Council to reject an applicant or to recommend its admission. On the other hand, this fact indicates the discretionary nature of this function of the Security Council, while, on the other hand, the freedom of the General Assembly either to accept the recommendation and admit the applicant or to reject the application indicates that the function of the General Assembly in this matter is also discretionary'.

[13] United Kingdom Delegation to the United Nations.

therefore ceases to be part of His Majesty's Dominions) while remaining within the British Commonwealth. The India (Consequential Provision) Act, 1949, was passed to avoid any change in the legal position under United Kingdom law of India or of Indians, whether in regard to their rights, or their liabilities, or their property. It is recognised that the enactment by the Indian Parliament of the further legislation (referred to above) may necessitate a review of United Kingdom nationality legislation, for example the British Nationality Act, 1948. India will, under the 1949 Act, still be counted a part of His Majesty's Dominions for the purpose of Acts of Parliament passed before January 26, 1950, subject to any alteration which may be made by Order in Council under section 1 (3) of the Act. Provisions of United Kingdom law relating to British subjects will continue to apply to citizens of India. It follows that, for example, provisions in the Constitutional Instruments of Colonies, requiring voters or elected members of the Legislative Council to be British subjects, will not exclude Indian citizens from voting or from membership.

The important clause of the Indian citizenship provisions from the point of view of the Colonies is Article 8, which provides for the local registration of certain persons of Indian origin who thereupon are deemed to be citizens of India. Persons already citizens of the United Kingdom and Colonies who become Indian citizens under the new legislation will have dual citizenship. It is assumed that the Master Nationality rule will be applicable to those residing in a Colonial dependency.

There seems, therefore, to be no difficulty as regards the present position of Indian citizens in the United Kingdom and Colonies as they are treated as British nationals, but their position in other Commonwealth countries has not yet been stated by the respective Governments of these countries, although the Indian President has now made a declaration according to Articles 367 (3) and 392 (3) of the Indian Constitution to the effect that subject to any provisions of the law made by the Indian Parliament every country in the Commonwealth is declared not to be a foreign State for the purposes of the Constitution.

Some Considerations relating to the Control of Corporations and their Subsidiaries, their Residence, Domicile and Nationality, in the Light of Double Taxation Relief

The discipline of Private International Law may be said to consist essentially in unravelling an international factual situation in order to isolate the juridical element or elements

involved and in then localising them in terms of the correct jurisdiction and their governing law or laws. An entirely similar discipline is involved in applying double taxation relief measures. If they are not to be taxed in more than one place, profits and income must obviously be isolated and localised for purposes of tax in and by what may be called a single 'fiscal jurisdiction'. The isolation and localisation of the *objects* of tax (profits and income), however, cannot be achieved without the complementary isolation and localisation of the *subjects* of tax, namely the persons—corporations or individuals—who enjoy them. It is with the twofold process of the isolation and localisation of the objects and subjects of tax, as this is related to corporations, that the present note is generally concerned. More particularly, it is concerned with the concept of control as the cardinal isolating and localising factor in determining the residence, domicile or nationality of a corporation in a given case.

'The conception of control', the Permanent Court of International Justice insisted in the case of *German Interests in Polish Upper Silesia* (1926), 'is an essentially economic conception'.[1] The truth of this is reflected in the circumstance that in so far as there exists a general body of internationally unified law concerning the residence, domicile and nationality of corporations, it has evolved out of Trading with the Enemy legislation in the two world wars, out of the administration of the Peace Treaty provisions that followed them, and principally out of the revenue laws of the various domestic systems, as also in the further circumstance that the mainspring of this legal evolution has been the search for and the increasing clarification of the primarily economic conception of control. But if, in the wider field, economics and politics are virtually impossible to separate they are none the less so in the narrow field which constitutes the present subject of investigation. Nationality of corporations is more properly a concept of political law, while their residence and domicile are better considered as that part of the civil law which is concerned with economics. Yet there has always been a confusing dualism between the nationality and residence of corporations. The harder problem confronting the International Court in the above-mentioned case, was not the determination of control as such but the decision whether, once determined, it was to be used as a criterion of the place of residence of those exercising control or as a criterion of their nationality. Though the court there held control to be a nationality test (being constrained so to interpret the Geneva Convention between Germany

[1] P.C.I.J. A.7, p. 69.

and Poland then in question), this principle was not uniformly adhered to in the interpretation of Peace Treaties other than that of Versailles or by the Mixed Arbitral Tribunals other than the Franco-German. The bogey of this dualism between enemy character and enemy nationality has beset all Trading with the Enemy legislation in both world wars. 'Knowing your enemy' is no such easy matter as might at first sight appear, and it is revealing of the difficulty that the original Article 2 of the U.K. Act of 1939, which set out to define enemy in terms of residence (or more accurately, commercial domicile), was later amended by the resuscitation and addition of the nationality principle.[2] The same dualism lay at the root of one of the most intricate international legal problems of the present post-war period, the definition of German assets in Austria under the Potsdam Agreement.

Nor has the complication introduced by the nationality principle been entirely restricted to war-time and post-war problems, though there is encouragement to be drawn from the growing clarity with which its true (and minor) role in the international law of corporations is becoming more universally recognised—particularly on the continent—and its often misleading significance appreciated. A comparison between the writings of Vaughan Williams and Crussachi in 1935 [3] and Arminjon [4] in 1948 amply reveals this. The former two writers, while declaring the unimportance of the concept of nationality in English law, were nevertheless at pains to assess how it must be determined, and in considering continental law demonstrated the then overriding necessity of determining it in view of its identification with the 'personal law' of the corporation. Though they conceded that its importance was restricted, they appeared to overlook—what is here submitted to be essential—that the national law of a corporation must be divorced from its personal law, in the following typical passage: 'Can nationality, in the case of a corporation, mean more than this—that it owes both its existence and the rules that govern it to some national system of law?' [5] The passage they quoted from Marburg went, however, too far in the opposite direction: 'There is no such thing as the nationality of a juristic person in private law. There has been a confusion between nationality and personal status'.[6] A better balance is to

[2] S.R. & O. 1940, No. 1092.
[3] 'Nationality of Corporations', 49 L.Q.R. 340.
[4] *Précis de droit international privé commercial*, 1948. [5] 49 L.Q.R. 345.
[6] Cited from Marburg: *Staatsangehörigkeit und feindlicher Charakter juristischer Personen*, p. 12, which reads: 'Eine Staatsangehörigkeit juristischer Person im Privatrecht gibt es überhaupt nicht. Man hat hier Staatsangehörigkeit und Personalstatut verwechselt'.

be found in 1948 in Arminjon. Referring to those who oppose the fiction whereby a moral person has no legal existence outside the country by the laws of which it comes into being, he says: ' . . . les adversaires de cette théorie ont pour la plupart lié la question de ce que nous dénommerons l'appartenance et le rattachement des sociétés à celle de leur personnalité et de leur prétendue nationalité. Pour eux les sociétés, étant des sujets de droit, se relient nécessairement à un Etat par un lien d'allégeance qui détermine leur statut personnel, lien qu'ils supposent identique à la nationalité par sa nature et par les droits et obligations qui en résultent. Logiquement, cette proposition est une pétition de principes; pratiquement elle donne des résultats que les Tribunaux ont dû écarter pendant la guerre. Elle détourne l'expression nationalité de son sens. La prétendue nationalité des sociétés n'implique pas nécessairement, comme celle des individus, l'existence d'un Etat; elle peut les relier à un systéme juridique fédéral ou provincial; elle s'acquiert ou se perd à des conditions tout autres. . . . Lors donc qu'on parle de la nationalité d'une société et qu'on la qualifie de nationale, d'étrangère, de française, de belge, d'italienne, il importe de bien entendre que cette expression ne doit pas être prise dans son sens littéral, mais seulement métaphoriquement, pour la commodité du langage '.[7] Arminjon thus comes to distinguish the ' lien de sujétion ' which ' unit la société à un Etat ' (and secures, for example, diplomatic protection [8]) from the ' lien d'appartenance ' which determines the personal status or ' condition juridique ' of a corporation (which is normally unchangeable). This is virtually on all fours with the English conception of the country of incorporation as determining both the nationality and the domicile (unchangeable [9]) of a corporation. Satisfaction may well be felt at this growing harmony of view.

Yet unfortunately we are not free, as will be apparent, from the concept of the nationality of corporations in considering international double taxation relief. The growing recognition that it belongs to the more restricted field of political or public law has,

[7] *Op. cit.* pp. 55–6.

[8] Brochure 129 of the International Chamber of Commerce in a suggested draft ' International Code of Fair Treatment for Foreign Investments ' seeks to provide certain legal guarantees for foreign investing corporations by virtue of their nationality, which concept is deferred for subsequent definition by the parties. The efficient working of any such or similar convention would appear to depend on the unification of the international law of the nationality of corporations. It may be found, as the report of the Codification Committee on this subject suggested in 1927, that nationality alone, without residence, does not provide a sufficient legal basis.

[9] *Gasque* v. *I.R. Commissioners* [1940] 2 K.B. 80. And see generally *The Residence and Domicil of Corporations*, by A. Farnsworth, to whom the present writer is personally indebted for valuable suggestions regarding this article.

although not without some influence there, left the essential attitudes of American law unchanged.[10] Nationality as a principle of U.S. revenue law is too firmly rooted to be capable of exclusion from international taxation relief conventions entered into by the U.S.A. with other countries. This accounts for the salient differences between the U.K.–U.S. convention and those, for example, concluded by the U.K. with Canada, South Africa, Southern Rhodesia, Australia and France. These must now be examined more closely.

Of the six conventions concluded by the U.K. with the other countries named,[11] that with France is the only one to use the term ' fiscal domicile ' as connoting a country in which a corporation is resident, though all alike adopt as one of their main localising principles, if not as the main principle, the residence of the corporation which is subject to tax. ' The words " fiscal domicile " mean the place where a company manages and controls its business and a company is to be deemed to be resident at the place where its fiscal domicile is situated ' states the Anglo-French convention.[12] Residence of a corporation at its place of management and control has been a well-established principle in English domestic revenue law since the case of *De Beers Consolidated Mines* v. *Howe, Ltd.* [1906] A.C. 455 and was finally confirmed in *Egyptian Delta and Land Investment Co., Ltd.* v. *Todd* [1929] A.C. 1. Identical with the *siège social effectif* of French law, it now constitutes the localising element founding fiscal domicile for the purposes of international double taxation relief. The expression ' fiscal domicile ' may be no more felicitous than the anomalous ' commercial domicile ' current in time of war. Fiscal domicile, like commercial domicile, is totally unrelated in English law to domicile *per se* of a corporation. In continental law it probably is more closely related,

[10] This is true not only of American law. Though, for the purposes of international double taxation relief, the Netherlands have agreed to adopt the principle that residence is determined solely by management and control, in Dutch domestic law a corporation is deemed resident in the Netherlands if either it is incorporated under that law or is managed and controlled within the Netherlands. The Anglo-Swedish double taxation convention provides that a corporation is resident in Sweden if it is incorporated under the laws of Sweden and if its business is either not managed and controlled in the United Kingdom or is managed and controlled in Sweden. The more recent U.K.–Eire Convention provides that a corporation is to be deemed resident in the Republic of Ireland if it is incorporated under the laws of that Republic and its business is not managed and controlled in the United Kingdom. By New Zealand income tax law a corporation is regarded as resident in New Zealand if either it is incorporated in New Zealand or it has its head office there.

[11] With U.S.A. April 16, 1945; Canada, June 5, 1946; South Africa, October 14, 1946; Southern Rhodesia, September 3, 1946; Australia, October 29, 1946; France, October 19, 1945. These are very well treated in F. E. Koch, *The Double Taxation Conventions*, to which the present writer is indebted. There are other more recent conventions.

[12] Article 1 (4).

but domicile *per se* is in continental law of even less importance than in English law.

Since a corporation is to be deemed to be resident at the place where it is managed and controlled, the meaning of management and control in this context must be put beyond doubt. Unmistakeably it connotes, as in English domestic revenue practice, direct management and control of the business or trading activities of the corporation. It is thus distinct from two other types of control with which the double taxation relief conventions are concerned. For convenience it may be well to set out all three, as follows :

1. Management and control of the business, or trading activities, of the corporation.

2. ' Participation in the management, control or capital of a corporation ',[13] and

3. The measure of control exercisable in relation to the voting power possessed by the individual or group who exercises it.

In the twofold process of isolation and localisation involved the first of the above types of control localises the corporation in terms of its place of residence, the second and third isolate and localise profits, within their appropriate fiscal jurisdiction. In other words, the first type of control is a criterion relating to the subject of tax, the second and third are criteria relating to the object of tax. All three will be further examined.

Dualism of Residence and Nationality in Conventions with the U.S.A.

Residence of a corporation at the place of management and control is, as previously indicated, not so simple of application in the case of tax relief conventions with the U.S.A. There is a twofold reason for this : first, taxation is administered by the U.S.A. on a nationality (cum residence) basis and, second, the fiction of American law that a corporation can have no existence (and therefore presumably no residence) outside the country in or under the laws of which it is incorporated is taking an unconscionable time a-dying. (It would be interesting to assess, incidentally, how far the U.S. Trading with the Enemy legislation has indirectly and unintentionally hastened its demise.) Localisation in terms of residence determined by control cannot therefore apply in a tax relief convention of any country with the U.S.A. Suppose a U.S. corporation[14] controlled in, say, the U.K. so as to be there resident in the eyes of English law. American law will not adopt the same

[13] Article 4, Anglo-U.S. Convention.

[14] ' A U.S. domestic corporation is one organised or created in the U.S. or under the law of the U.S. or any State or territory thereof ', U.S. Internal Revenue Code, s. 3797.

view as to residence, and, furthermore, the corporation will in any event be taxable on its entire income from all sources within and without the U.S.[15] as a national corporation. Hence the recognition (italicised here) of this state of affairs in Article 2 (i) of the Anglo–U.S. convention, subsection (g): 'The term "resident of the United Kingdom" means any person (*other than a citizen of the United States or a United States Corporation*) who is resident in the United Kingdom for the purposes of United Kingdom tax and not resident in the United States for the purposes of United States tax. A corporation is to be regarded as resident in the United Kingdom if its business is managed and controlled in the United Kingdom', and subsection (h): 'The term "resident of the United States" means any individual who is resident in the United States for the purposes of United States tax, *and any United States corporation and any partnership created or organised in or under the laws of the United States, being a corporation or partnership which is not resident in the United Kingdom for the purposes of United Kingdom tax*'.

This dualism of residence and nationality is similarly apparent in the Convention between France and the U.S.A., promulgated January 25, 1945, which lays down (Protocole III, b, *et seq.*) that: '(b) Le mot "entreprise" comprend toute forme d'exploitation appartenant à un particulier, société en nom collectif, société anonyme ou toute autre personne morale; (c) l'expression "entreprise d'un des États contractants" signifie, suivant le cas, "entreprise américaine" ou "entreprise française"; (d) l'expression "entreprise américaine" désigne une entreprise exploitée aux États-Unis d'Amérique *par un rèsident des États Unis d'Amérique ou par une société ou autre collectivité Américaine.*[16] L'expression "société ou autre collectivité Américaine" désigne toute société ou autre collectivité créée ou organisée dans les États-Unis d'Amérique ou suivant les lois des États-Unis d'Amérique ou d'un État ou territoire des États-Unis d'Amérique.'

This digression into American law disposes, for the present, of the role of the concept of nationality of a corporation in international double taxation relief. It may, incidentally, have thrown into better relief the function of the concept of residence as underlying the main principle on which this relief is in general administered. It is revealing, for example, that the next two following subsections of Article 2 proceed to wrest the terms 'United Kingdom enterprise' and 'United States enterprise' from their usually accepted

[15] Sections 13, 14, 15, U.S. Internal Revenue Code.
[16] My italics.

meaning (flavoured with nationality) of an enterprise incorporated in the U.K. or U.S. as the case may be, to re-define them as 'an industrial or commercial enterprise or undertaking carried on by a *resident* [16] of the U.K. or U.S.'.

Residence the main Principle of Double Taxation Relief

At this stage we may fairly pause and visualise the corporations incorporated in all such countries as figure in the network of international double taxation relief, as localised in the country (or fiscal jurisdiction) of their place of residence (making due allowance for the artificiality of that concept as applied to corporations incorporated in the U.S.A.). Their disposition throughout these countries will be entirely different from their disposition when viewed in the light of their nationality. Arrest their disposition as determined by residence and lay down the principle that they shall be taxable on their profits in and by, and only by, the jurisdiction where they are thus found to be and the main principle of double taxation relief is established.

Residence, it is thus apparent, is an entirely unitary conception. What is to become, then, of double residence, deriving from divided control of corporations, such as the House of Lords found to exist in *Swedish Central Ry.* v. *Thompson* [1925] A.C. 495? The event must be awaited. The conventions do not in terms deny that double residence may exist, though it would seem certain that no relief could be afforded under them upon the basis of their primary principle of exemption from tax in all but the country of single residence. In *Swedish Central Ry.* v. *Thompson*, the facts of the case were held to support the decision that the company had a double residence. In the Anglo-U.S. convention it was the interacting operation of American and English law that necessitated the abandonment of the single residence principle. What is to be the fate of cases of the Swedish type to which conventions apply wherein the single residence principle has been preserved?

Though, in the main, corporations may be capable of isolation and localisation in terms of a single residence, we are none the less concerned with the fact that they are engaged in international trade and have therefore manifold relations with other countries. If the country of their single residence is to tax them, are the other countries with which they have relations to be entirely debarred from taxing them? Yes, so long as the corporations' trading relations with them are conducted at arm's length and involve no permanent establishment there, no 'projection of the foreign

enterprise itself into the territory of the would-be taxing state in a substantial and enduring form '.[17] Thus, for example, Article 3 of the Anglo-U.S. convention : ' A United Kingdom enterprise shall not be subject to United States tax in respect of its industrial and commercial profits unless it is engaged in trade or business in the United States through a permanent establishment situated therein. If it is so engaged, United States tax may be imposed upon the entire income of such enterprise from sources within the United States '. There are corresponding articles in the other conventions.

Localisation and Residence of Subsidiary Corporations

At first sight it would appear that possibly the most important type of permanent establishment through which a corporation could trade in a foreign country would be its subsidiary, taking precedence in importance over an agency or a branch. By the terms of the conventions, however, a subsidiary is deemed not to constitute a ' permanent establishment '. Thus the Anglo-U.S. convention, Article 2 (1) (l) : ' . . . The fact that a corporation of one contracting party has a subsidiary corporation which is a corporation of the other contracting party or which is engaged in trade or business in the territory of such other contracting party (whether through a permanent establishment or otherwise) shall not of itself constitute that subsidiary corporation a permanent establishment of its parent corporation '. In other words, trading by a corporation through a subsidiary in another country does not constitute trading *in* that other country but trading *with* it. This is in harmony with the general principle of international commercial law that a subsidiary is a legal entity separate from its parent corporation, and possessing a separate *siège social*.

The double taxation relief conventions thus establish the principle that while a subsidiary can in no circumstances attract its parent corporation to its own residence and make it taxable there, the parent can, by assuming the direct management and control of the subsidiary's business, attract the subsidiary to the residence of the parent for the purposes of tax. The second part of this principle was illustrated as long ago as 1913, in the English case of *The American Thread Co.* v. *Joyce*, 6 Tax Cas. 161, where an English owned subsidiary incorporated and registered in the U.S.A. was held resident in this country and taxed upon the whole of its profits under Case 1 of Schedule D, not for the reason that it was

[17] Carroll, before the Sub-Committee of the Committee on Foreign Relations of the U.S. Senate on May 23, 1945.

so owned but for the reason that the actual management and control of the business were held to be in England.

Clearly, the fiscal authorities do not cease to be interested in a subsidiary corporation operating within their jurisdiction because their residence or fiscal domicile is recognised to be abroad or with the parent. Wherever it be held resident a subsidiary corporation is always liable to the appropriate tax on its profits in and by the country where it operates, in accordance, be it noted, with the principle of its separate legal existence. Relief from double taxation in this as in all cases is achieved, not as the result of the one process of isolating and localising the subject of tax but by its operation in conjunction with the other and complementary process of isolating and localising the object of tax and affording relief by reduction or credit of the tax levied, or both. Before passing to a consideration of this matter, we need first, however, for the sake of completeness, to examine:—

The Permanent Establishment. Whenever a corporation sets up a permanent establishment,[18] be it a branch, an agency, an office

[18] 'The term "permanent establishment" means a branch, management, factory or other fixed place of business but does not include an agency unless the agent has, and habitually exercises a general authority to negotiate and conclude contracts (on behalf of the principal) or has a stock of merchandise from which he regularly fills orders on (the principal's) behalf'—(Art. 2 (1) (l), Anglo-U.S. convention.

The Convention between France and the U.S.A. lays down that: 'Le terme "établissement stable" désigne les succursales, exploitations minières et pétrolifères, plantations, fabriques, ateliers, magasins, bureaux, comptoirs d'achat et de vente, agences, dépôts et autres centres fixes d'affaires, *mais ne comprend pas les sociétés filiales.*

Lorsqu'une entreprise de l'un des États contractants fait des affaires dans l'autre État par l'entremise d'un employé ou agent y établi qui est investe des pouvoirs nécessaires pour la négociation et la conclusion des contrats ou qui dispose d'un stock de marchandises pour satisfaire habituellement aux commandes qu'il recoit, cette entreprise est considérée comme ayant un établissement stable dans ce dernier État, mais le fait qu'une entreprise de l'un des États contractants ait des relations d'affaires dans l'autre État par l'intermédiaire d'un commissionnaire ou courtier vraiment autonome ne permet pas de regarder cette entreprise comme ayant un établissement stable dans ce dernier État.

Les entreprises d'assurances sont considérées comme ayant un établissement stable dans l'un des États dès l'instant qu'elles y perçoivent des primes ou qu'elles assurent des risques situés sur le territoire de cet État'.—Protocole III (a). Italics mine.

What amounts to setting up a permanent establishment is a matter probably capable of varying determination in different countries, though a certain number of precedents are available. In *Grainger & Son* v. *Gough* [1896] A.C. 325, it was held that a foreign merchant who canvassed through agents in the U.K. for orders for the sale of his merchandise to customers in the U.K. did not exercise a trade in the U.K. within the meaning of the Income Tax Acts, so long as all contracts for the sale and all deliveries of the merchandise were made in a foreign country.

In *Commissioner of Internal Revenue* v. *Scottish-American Investment Co., Ltd.* (1944) 323 U.S. 119, three investment trusts organised under the laws of Great Britain with principal offices in Edinburgh appointed a member of an American accounting firm as their assistant secretary, instructing him

or an installation in another country, it is no longer trading with that country but trading in it. In consequence, and in harmony with the underlying principle that such permanent establishments are not legal entities separate from their parent body, the latter is attracted, as it is not so attracted by a subsidiary, into the fiscal jurisdiction of the country where the permanent establishment is set up. It is the parent corporation itself that becomes taxable in and by that country upon all the industrial or commercial profits it derives from a permanent establishment therein.

How is the quantum of profits to be determined? In principle the answer is simple enough : attribute ' to such permanent establishment the industrial or commercial profits which it might be expected to derive if it were an *independent* enterprise engaged in the same or similar activities and dealing at arm's length with the enterprise of which it is a permanent establishment and the profits so attributed shall . . . be deemed to be income from sources within the territory '[19] where the permanent establishment operates.

The Controlled Enterprise. Between the positions occupied *vis à vis* the controlling corporation respectively by a permanent establishment and a subsidiary, where the business of the latter is managed and controlled at the residence of the parent, is the position of what the conventions term the ' controlled enterprise '. This is an enterprise subject to one or other, or both, of the second and third forms of control already noted, and, clearly, a subsidiary will itself be such an enterprise where its business is *locally* managed and controlled. Precisely what relationships between one corporation and another make one a subsidiary of another is nowhere, unfortunately, defined in the conventions.[20] The controlled enterprise, however, is there defined as one in the ' management, control

to establish and maintain an office in the U.S. to represent their interests, keep records of all their American holdings and collect and receive dividends thereon. By this arrangement the three trusts sought also to obtain certain tax advantages in the U.S. It was held they had ' an office or place of business in the U.S. and were entitled to be taxed as resident foreign corporations '.

Section 415 of the English Companies Act, 1948, lays it down that, for the purposes of the Act, the expression ' place of business ' (established in this country by a company incorporated outside Great Britain) ' includes a share transfer or share registration office '.

[19] Article 3 (3), Anglo-U.S. convention. Italics mine. The logicality of the arrangement of this article (and the comparable articles in the other conventions) becomes at this point more apparent. Sections 1 and 2 relate to the isolation and localisation of the subjects of tax, ss. 3 and 4 to the isolation and localisation of the objects of tax.

[20] For the purposes of the English Companies Act, 1948, s. 154 (1) lays it down that ' a company shall be deemed to be a subsidiary of another if, but only if (a) that other either (i) is a member of it and controls the composition of its board of directors; or (ii) holds more than half in nominal value of its equity share capital; or (b) the first mentioned company is a subsidiary of any company which is that other's subsidiary '.

or capital ' of which another enterprise participates, in such a way that ' conditions different from those which would be made with an independent enterprise ' are imposed on the enterprise thus controlled. The temptation to shift profits from the controlled enterprise to the controlling body, or vice versa, according to the country where the lower rate of tax prevails, is obviously considerable. These considerations fully explain the necessity for Article 4 of the Anglo–U.S. convention (and the corresponding articles in the others) and reveal the logicality of the order in which it appears; ' Where an enterprise of one of the contracting parties, by reason of its participation in the management, control or capital of an enterprise of the other contracting party, makes with or imposes on the latter, in their commercial or financial relations, conditions different from those which would be made with an independent enterprise, any profits which would but for those conditions have accrued to one of the enterprises but by reason of those conditions have not so accrued, may be included in the profits of that enterprise and taxed accordingly '.

That is the manner in which the conventions regulate the question of the tax on profits of the controlled enterprise in the country where it operates. The controlling corporation is, however, not only interested in profits as such. It is also interested in dividends payable to it by the controlled enterprise, and hence in the amount of tax deductible therefrom either at source or when received or both. It is in connection with the taxation of dividends that the third type of control which one corporation may exert over another comes into play, at least in the Anglo–U.S. convention, Article 6 of which provides inter alia that the U.S. tax on dividends payable to a resident in the U.K. ' shall not exceed 5 per cent. if such resident is a corporation controlling, directly or indirectly, at least 95 per cent. of the entire voting power in the corporation paying the dividend, and not more than 25 per cent. of the gross income of such paying corporation is derived from interest and dividends, other than dividends received from its own subsidiary corporations '. The Article adds, however, ' such reduction of the rate of tax to 5 per cent. shall not apply if the relationship of the two corporations has been arranged or is maintained primarily with the intention of securing such reduced rate '. The comment may not be inappropriate that it is a pity this matter should rest on a factor so notoriously difficult of determination in law as the factor of intention.

E. H. Wall.[21]

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BOOK REVIEWS

The British Year Book of International Law. [London : Oxford University Press. 1948. 507 pp. 45s. net.]

Its twenty-fifth year of issue finds the British Year Book as vigorous, learned and informative as ever. The 1948 volume has almost twice as many pages as that of 1939, with fourteen instead of seven articles, and the notes and the summary of decisions are as full and helpful as in the past. The documentary section with its account of the constitutions of the Inter-governmental Maritime Consultative Organisation and the Universal Postal Union should also be very useful for reference. There is in truth much to set against the increase in price—now about threefold that of the pre-war volume.

It is perhaps symptomatic of the uncertainties of our time that no less than three of the articles touch on the question which faces every student of international law at the outset—the relation between international law and international morality. Binding obligation, thinks Mr. Blaine Sloan in his discusssion of the Binding Force of a 'Recommendation' of the General Assembly of the United Nations, is not to be confused with enforceability, but he concludes that most resolutions of the Assembly have no legal force, though their moral force is considerable as an expression of world opinion. Until this moral force, which is also a nascent legal force, receives the *imprimatur* of the world community it enjoys a 'twilight existence' like many emergent rules of the common law within States. And we find Professor Lauterpacht in the concluding article in the volume returning to the same theme when considering the effect of the proclamation by the Assembly of the Universal Declaration of Human Rights, and insisting that it was never intended to be a legal document nor to be the subject of legal interpretation. None the less it is binding 'in the sphere of conscience' and, it is to be hoped, will supply the first step towards an ultimate Bill of Rights with safeguards independent of the will and power of the individual signatory States. The difficulties and dangers arising from the lack of enforceability are well brought out by Professor Waldock in his article on the Falkland Islands Dispute. The United Kingdom cannot get recognition of its legal rights owing to the refusal of its rivals to have the matter tested judicially, while all the time, relying on the absence of compulsory legal enforcement, they are working diligently to turn claims into legal rights under cover of the present twilight character of the whole international system. On the other hand where

retaliation is possible, as in disputes about treatment of diplomatic envoys, rules resting on custom or treaty have been reasonably well sanctioned from an early date as in shown in Dr. Schwarzenberger's essay on 'International Law in Early English Practice'. Recent events however have proved that when one State isolates itself from international intercourse even this sanction is inapplicable.

In the meantime, international law goes on developing, and Mr. Oscar Schachter's paper on the 'Legal Opinions of the United Nations Secretariat' illustrates how much has been done by the Secretariat, working in a sphere where its influence is decisive, in the ascertaining and application of legal rules, particularly as to the effect of the India Independence Act, and as to the scope of the obligation to register treaties. As a law-administering body it has already, according to Mr. Schachter, shown that both the constitutive and the declaratory theories of State recognition are inadequate. And the observations of Dr. Hambro on the Compulsory Jurisdiction on the International Court of Justice are a valuable guide to the practice of the Permanent Court in its relation to the Statute of its successor and the Charter of the United Nations. The beginning of what may be a new phase in the practice of the United Kingdom is discussed by Mr. R. S. B. Best in a paper on the Anglo-American Consular Convention of 1949, the first ever to be concluded by this country on the position of consular officers and a 'valuable achievement in a department of international law particularly concerned with the interests of the ordinary citizen'. Dr. Mervyn Jones in his authoritative explanation of the British Nationality Act, 1948, points out that at last English law puts the married woman, so far as citizenship is concerned, in the same position as a man, and that allegiance disappears from the definition of a British subject though it remains a consequence, if no longer a source, of British nationality.

In the Second World War the German policy of killing hostages with a view to crushing the resistance movements in occupied territory led to the slaughter of great numbers of innocent people. It is to be hoped that such acts will not again be committed, nor the legality of such a policy ever have to be considered by a court in the future, as it has been in the past, but, if the question arises, account will have to be taken of Lord Wright's well documented paper in which he concludes that both on principle and authority the killing of hostages (including reprisal prisoners) is 'contrary to the law of war, and that it is not permissible in any circumstances, and that it is murder'.

Not less interesting and useful are the articles on 'The Conclusiveness of the Statements of the Executive' by Mr. A. B. Lyons, on 'Extra-Territorial Asylum' by Miss Morgenstern, on 'Termination of Diplomatic Immunity' by Mr. R. G. Jones. Finally, Mr. Walter Raeburn poses once more the question whether the

renvoi is or should be accepted as a sound doctrine of law and in particular whether the 'open offer' formula can be supported. Applying a 'realistic' test he accepts it as being without any practicable alternative. Historically inconsistent and illogical as it is, the doctrine can still be made to work and is capable of modification into a new shape if circumstances so require.

J. W. Jones.[1]

International Law, Vol. I. International Law as Applied by International Courts and Tribunals. Second Edition. By Georg Schwarzenberger, ph.d., dr.jur., Reader in International Law in the University of London; Vice-Dean of the Faculty of Laws, University College, London. [London: Stevens & Sons, Ltd. 1949. liv and 554 and 137 (Appendices and Index) pp. £3 10s. net.]

The first edition of this work was highly praised in the legal periodicals when it appeared in 1945. The second edition maintains the high standard of the first. It has been thoroughly revised and much new material has been added.

The Charter of the United Nations, for example, is considered at some length in the concluding chapter, although mainly in the light of decisions of the Permanent Court of International Justice on the League of Nations. There is, however, a discussion of the opinions of the minority of the International Court of Justice in the *Corfu Channel* (*Preliminary Objection*) *Case* (1948) on the effect of a recommendation of the Security Council under Article 36 of the Charter. The implications of the Advisory Opinion of that court on 'Membership in the United Nations' (1948) are also fully developed; Dr. Schwarzenberger considers—and the present reviewer would respectfully agree—that the minority view in that case is to be preferred, on the ground that 'while the Charter makes the qualifications (for membership) specified in paragraph 1 of Article 4 essential, it does not make them sufficient'; a member of the United Nations ought, therefore, to be able to vote against the admission of a candidate for whatever reasons, or to give its vote in favour of admission on whatever conditions, may seem right to it.

Another very important topic which is included in this edition is the 'Trial of the German Major War Criminals' (1946), which occasions a most interesting and detailed discussion. Dr. Schwarzenberger regards the Nuremberg Tribunal as more akin to a joint tribunal under municipal law than to an international tribunal. In form it was an *ad hoc* military tribunal and its application of international law was qualified by its primary duty to

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apply the law of its constituent Charter. ' From the point of view of international law, the judgment then may claim at the most the standing of twenty-three identical judgments of municipal courts. The significance, therefore, of the judgment for the development of international law depends entirely on its persuasive authority, that is to say, on the question whether, and to what extent, the tribunal has done more than merely apply its Charter : whether it has convincingly declared international law '. Dr. Schwarzenberger admits that war crimes in the narrower sense as defined in the Charter of the tribunal are war crimes under international law for which individuals may be held responsible. He is much less happy about the responsibility in international law of individuals for crimes against the peace. He does not think because breach of the Kellogg Pact is illegal, it follows that such an illegal act is an international crime on the part of the individual who breaks the Pact. Here, however, he would appear to do less than justice to the tribunal. To argue that just as war crimes in the narrower sense involved individual responsibility so war itself may become an international crime is not, as Dr. Schwarzenberger suggests, merely a pious aspiration disguised in legal language. Dr. Schwarzenberger himself admits that ' like other courts, municipal and international, the tribunal was entitled to consider international law as a growing and dynamic body and not limited to leaving the law exactly where it found it '. It is proper to add that this admission is qualified by the proviso that ' such law-making in disguise must, however, be organically connected with what happened before in order to be accepted as a declaration of existing law '. The argument must depend on what is meant by the somewhat unhappy word ' organically '. The present reviewer can see no ' organic ' or ' logical ' or ' necessary ' (to use words which are sometimes employed in a similar context) connection between the pre-existing law and a new decision, but it will appear unexceptional if its so-called ' organic ' connection is based on values which are unexceptional in the eyes of the community. It may be true that the practice of some States (which is not, with all due respect to Dr. Schwarzenberger, the same thing as State practice) since the Kellogg Pact does not suggest condemnation of individuals guilty of aggression as international criminals. On the other hand, what Dr. Schwarzenberger calls ' standards of international morality . . . postulated by wide sections of public opinion in the Western democracies ' afford in the opinion of the reviewer a sufficient basis for the tribunal's decision that the waging of aggressive war is an international crime. It is easier to agree with Dr. Schwarzenberger that the conception of ' crimes against humanity ', in the restricted sense in which it was interpreted by the tribunal to cover only crimes connected with war crimes or crimes against the peace, is better regarded as the creation of the Charter of the tribunal rather than as declaratory of international law.

The first edition of the work under review was criticised in some quarters for its general approach to international law. This approach is sufficiently indicated by the sub-title 'International Law as applied by International Courts and Tribunals'. Perhaps the most interesting addition to the second edition is an expanded Introduction in which the 'inductive' method of treating international law is explained and defended. It is doubtless true that 'mutual quotation clubs and what Bentham called *ipse dixitism* have been rampant in the treatment of international law', but this does not seem an argument for rushing to the opposite extreme and excluding from the sphere of international law subjects which do not happen to have been discussed by an international court or tribunal. The author asks us in effect to postpone judgment until his second and third volumes dealing respectively with British State Practice and with the decisions of courts within the British Commonwealth and Empire have appeared. But the appearance of a second edition of the first volume before the other volumes have been published makes such restraint difficult. It is hard to believe that the three volumes, when completed, for all their immense learning and painstaking research, can give a true picture of international law as a developing force in human affairs. Dr. Schwarzenberger says that 'the use of the inductive method on the analytical side leaves the international lawyer entirely free to choose other methods in the sociological and censorial fields'. This is where the present reviewer must part company with his author, for the former does not think it possible to consider law, and especially international law, divorced from ethical and sociological considerations. Even in the sphere of municipal law the most hard-bitten practising lawyer could hardly avoid speculations on the meaning of an Act of Parliament which had not yet come before the courts.

It would, however, be ungracious to conclude this review without re-emphasising the learning which has gone into Dr. Schwarzenberger's work; no student of international law can afford to ignore it. The value of this second edition is much enhanced by a number of new appendices, including a synopsis of the Statutes and Rules of the International Court of Justice and of the Permanent Court of International Justice. There is also a selected but, it would appear, very detailed and useful bibliography on the subject-matter of each chapter. It has been compiled by Mr. L. C. Green, Lecturer in International Law and Relations at University College, London. As Mr. Green is about to publish a case-book on International Law, the representative judgments which were appended to the first edition of Dr. Schwarzenberger's work have been eliminated.

Norman S. Marsh.[1]

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Annual Digest and Reports of Public International Law Cases, 1943–1945. Edited by H. Lauterpacht. [London : Butterworth & Co. 1949. xxxii and 584 pp. 55s.]

In 1949 the United Nations published a memorandum, submitted by the Secretariat to the Committee on the Progressive Development of International Law and its Codification, dealing with 'Ways and Means of Making the Evidence of Customary International Law more Readily Available'. In this document reference is made to the 'growing trend towards an inductive approach to international law', and from this point of view case-law is of extreme importance. One of the most significant repositories of this case-law is the *Annual Digest*, whose 'reputation and utility'—in the words of the memorandum—'are now beyond question'.

The present volume contains reports of some 200 decisions covering twenty-eight countries and it is obviously impossible in a review to refer to more than one or two of the most interesting cases.

In view of the recent decision of the Court of Appeal in *Krajina* v. *Tass Agency*, *Mexico* v. *Schmuck* decided by the Court of Appeals of New York, is of topical interest. Petroleos Mexicanos was an entity created under the laws of Mexico, with capacity to sue and be sued in its own name. During an action against this entity the Mexican Chargé d'Affaires informed the State Department that Petroleos Mexicanos was an 'agent and instrumentality' of the Mexican Government, and pointed out that it was not a corporate entity but was 'a public institution wholly owned and controlled' by the Mexican Government. The State Department informed the court that it recognised the claim to immunity, and the court held that unless the immunity was waived no action would lie. When the Amsterdam Court of Appeal was faced with a similar problem in *The Bank of the Netherlands* v. *The State Trust Arktikugol* (*Moscow*) *et al.* (1943), it held that it had jurisdiction with regard to the Arktikugol, but not with regard to the Soviet Trade Delegation in Germany or to the Soviet State Bank, even though both the latter might in fact be independent bodies, vested with a juridical personality of their own.

Since the unconditional surrender of Germany there has been much discussion among international lawyers as to the exact legal status of that country, and those who believe that Germany has ceased to exist as an international personality by reason of *debellatio* would argue that although the *Kuechenmeister Case* is perfectly good law in its own sphere, namely English municipal law, the attitude of international law would be different. A similar problem faced Sir Michael Myers in *Re Hourigan* (1945). In November, 1941, the applicant had been convicted for failing to render the service required of him as a member of the armed forces. He was held under a detention order 'for the duration of

the present war'. After the defeat of Germany he sought his release by way of *habeas corpus* and was confronted with a statement signed by the Minister for External Affairs to the effect that, despite the armistice with Italy and the unconditional surrender of Germany, 'a formal state of war still exists'. Sir Michael Myers dismissed the application, and in so doing said 'The White Papers . . . go no further, I think, than to declare that hostilities have ceased. They do not seem to me to declare the termination of a state of war'.

The present volume of the *Annual Digest* may be said to contain something to interest everybody for it includes decisions on the recognition of States and the position of the individual—it is interesting to compare the Canadian case *Re Drummond Wren* with the Latin-American cases *Re Nausa*, *Re Stiasny* and *Re Sucre*, or with *Ex p. Mohriez* in which an American District Court held that an Arab born in Arabia was 'white' and so entitled to apply for citizenship—international institutions and the interpretation of treaties, decisions of German courts in occupied Europe and the attitude of the liberated courts to German legislation, and numerous decisions on various points of prize law.

Professor Lauterpacht is to be congratulated on the fact that this volume not only lives up to, but enhances the reputation already established by the *Annual Digest*.

Leslie C. Green.[1]

Systematic Survey of Treaties for the Pacific Settlement of International Disputes, 1928–48. United Nations, Lake Success. [London: H.M. Stationery Office. 1949. x and 1202 pp. £2 10s.]

The General Assembly was empowered by Article 11 of the Charter to 'consider' the general principles of co-operation in the maintenance of international peace and security, and to make recommendations in regard to them, either to Members or to the Security Council. The Interim Committee of the Assembly, on its establishment in 1947, was entrusted with the task of carrying out a survey of these general principles, partly in order to give a little more body to the work of the Committee. As a first step, the Committee requested the Secretariat to prepare a systematic survey of treaties for the pacific settlement of disputes in order to bring up to date a previous study of treaty practice made in 1927 by the League Secretariat. This volume is the result.

The survey, although thirty-three earlier 1928 treaties are included, covers in substance the period from the General Act of Geneva of 1928 to the Pan-American Pact of Bogota of April, 1948.

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It comprises the relevant clauses of all treaties containing general obligations for the settlement of a broad class of disputes but not clauses of particular treaties merely providing for the settlement of disputes arising out of the treaty itself. It extends to all available treaties and is not limited, as was the League survey, to treaties registered with the Secretariat. Two hundred and thirty-four treaties are included, of which eleven are classified as multipartite, and the remainder bilateral. Curiously enough, although Articles 36 and 37 of the Statute of the Court are given, the relevant Articles of the Charter are omitted.

The book, following the arrangement of the previous survey, is divided into three parts : (1) a systematic analysis of the treaties, (2) texts of the treaties or of their relevant articles, and (3) chronological and alphabetical tables of the treaties. There is no index and, presumably, the analysis and the tables of treaties were intended to serve instead of an index. This necessarily means that a user of the book has to be fairly familiar with its arrangement before he can lay his finger quickly on particular points.

A scientific analysis of over 200 Instruments is no easy task. When treaties have the same broad pattern there are numerous differences of detail, and when articles have the same broad effect there may be troublesome variations of language. The method of this book has been to analyse the basic types of treaties, their general jurisdictional clauses, and their reservations, their main provisions concerning adjudication, arbitration and conciliation and other miscellaneous clauses, illustrating the analysis by excerpts from the texts. The book is competent and useful rather than stimulating, for the object is to provide the raw material for study, not the finished study. Perhaps a little more might have been done to distinguish the significant from the insignificant, but the book is an essential tool for the study of treaty practice in the pacific settlement of disputes.

The general picture is the familiar one of a few general constitutional instruments and a web of bilateral treaties—intricate, Lilliputian threads to hold down the Gulliver of force. Naturally, the influence of the General Act of Geneva is to be seen in some of the bilateral treaties, but political, as well as legal, patterns show through the web. The U.S.S.R. will have nothing but conciliation; the U.S.A. until 1945 nothing but conciliation or arbitration, the majority of European States conciliation, arbitration or judicial settlement. The last treaty in the book, the Pact of Bogota, 1948, is of particular interest as marking the adoption of all three procedures by the Pan-American States. Moreover, it is—appropriately—the most mature attempt to inter-relate all the various forms of machinery for pacific settlement of disputes and, as such, deserves careful study. The penultimate text, Article 8 of the Brussels Treaty, 1948, also has a special interest which is not, it is believed, shown in the analysis. The Brussels Powers agreed, inter alia,

that ' in the case of a mixed dispute involving both questions for which conciliation is appropriate and other questions for which judicial settlement is appropriate, any party to the dispute shall be entitled to insist that judicial settlement of the legal questions shall precede conciliation '. More may be heard of this formula in future attempts to provide for the possibility of orderly change without a total disregard of legal considerations.

Reports of International Arbitral Awards. United Nations. [London: H.M.S.O. 1949. Vol. I, pp. 614, 30s.; Vol. II, pp. 752, 35s.]

Arbitral and judicial decisions, although designated in Article 38 of the Statute of the Court only as a ' subsidiary means for the determination of the rules of law ', are of very considerable importance alike in the study and administration of the law. The decisions of the court itself are both set out in full in the official reports and have been conveniently collected by Professor Hudson. Publication of arbitral decisions has, however, been left entirely to private initiative and has been unsystematic. The value of the digests and collections associated with the names of La Fontaine, Lapradelle, Politis, Moore, Scott and Wilson needs no emphasis, but there is no chronological and complete series of reports of arbitral decisions.

The Secretariat of the United Nations and the Registry of the Court accordingly consulted together concerning the possibility of producing systematic reports of arbitral decisions and the Assembly voted the necessary finance. The work was entrusted to the Registry of the Court and these two volumes are its first fruits. It was decided to begin with a series of three volumes covering the period after the 1914–18 war and limited strictly to international cases, *i.e.*, cases between States. The idea presumably was that it is more important to have a complete collection of modern than of older cases. This may render the notation of later volumes a little inelegant if the work is extended to cover earlier periods. The notation of the present volumes is simply in numerical series.

The policy in regard to languages is not stated but the awards in these volumes are printed in French or English according to the language of the original. The cases are in chronological order, each being preceded by a brief but useful head-note indicating the legal issues dealt with in the award. It may be guessed that these head-notes will form the basis of the index which is to appear at the end of the third volume. As the series inevitably duplicates existing collections to a not inconsiderable extent the reception given to the first three volumes of this new venture may be

influenced by the quality of the index. The initiative of the United Nations in promoting the publication of complete collections of reports is, however, to be unreservedly welcomed.

C. H. M. Waldock.[1]

War Crimes Trials. Vols. 4 and 5. (The Hadamar and Natzweiler Trials.) [London: Wm. Hodge & Co., Ltd. 1949. 15s. each.]

Law Reports of Trials of War Criminals. Vols. 10–13. [London: His Majesty's Stationery Office. 1949. 5s. each.]

Two of the six volumes under review are published by private enterprise as a companion series to the well-known *Notable British Trials*. The series is under the general editorship of Sir David Maxwell Fyfe, though neither of these volumes displays any trace of his intervention. Mr. Anthony Webb has edited the trial of Fritz Hartjenstein, the commandant of Natzweiler concentration camp, and eight others on the charge of being 'concerned in the killing of four British women when in the hands of the Germans'. These women were members of Special Operations Executive who had been landed in France by parachute. After being captured they were lodged in Karlsruhe gaol for some weeks. On July 6, 1944, they were brought to Natzweiler, and the same evening injected and immediately afterwards cremated. No trial was held, nor were they given any warning of their fate. (It remains uncertain whether the injections were of phenol or Evipan: 'I did not think much about it', said the defendant Dr. Rohde, a man described by his old professor as 'a good student in the best meaning of the word'.) Three of the accused were acquitted; of the six who were convicted one (Rohde) was sentenced to death and the others received terms of imprisonment. (Later, four of these five, including Hartjenstein, were tried for other war crimes and sentenced to death.) In his introduction Mr. Webb deals admirably with the few legal points raised; but the trial is mainly remarkable for the fairness with which it was conducted; thus, no reference was made to the fact that Hartjenstein had previously been the commandant at Auschwitz.

The Hadamar trial took place before an American military tribunal, and the report of it is edited by Mr. Earl W. Kintner. The trial takes its name from a small mental hospital near Hadamar. The seven accused were the staff of the hospital, and they were charged with the murder of over 400 Poles and Russians. The victims appear to have been slave workers who had become useless

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to the Germans because of ill-health. They were brought to Hadamar ostensibly to receive medical treatment, and were there killed by means of injections or pills. Three of the accused were sentenced to death, and the other four to long terms of imprisonment. It is interesting to be able to compare the procedure of American and British military tribunals. The American trial Judge-Advocate has no responsibility for advising the members of the tribunal on legal matters; he is counsel for the prosecution, and apparently shares of the opinion of Richard Muir that 'the duty of a prosecutor is to prosecute'. It should be mentioned that each volume has a good index, and several photographs; the volume on the Natzweiler trial sets out in an appendix the Royal Warrant of 1945 (as amended) containing the regulations for the trial of war criminals.

The volumes published by H.M.S.O. are part of a series of fifteen 'selected and prepared by the United Nations War Crimes Commission'. Each volume has a helpful foreword by Lord Wright. The trials reported cover so wide a field that it is impossible to do more than indicate the contents of each volume. Volume 10 reports two cases, the I.G. Farben and Krupp trials; volume 11 deals with thirteen trials, the common factor being offences against prisoners of war (the Stalag Luft III trial is one of these); volume 12 (perhaps the most interesting) is devoted entirely to the trial of General von Leeb and thirteen other members of the German High Command (OKW); volume 13 is a miscellaneous collection of thirteen trials, including two for genocide in Eastern Europe.

Something may be said of the marked differences of editorial technique displayed in these six volumes. Mr. Webb gives a specific assurance that he has printed 'the verbatim, official record. Much of it is a translation from German, and it has only been edited where necessary to make the meaning clear'. Mr. Kintner is much more vague about his sources. On p. 5 he is content to say that he has 'made use of the shorthand transcripts of the trial', and he acknowledges 'the assistance given me by Colonel Leon Jawerski, trial Judge-Advocate . . . who made certain suggestions for the improvement of the text'. (It would be interesting to know where counsel for the prosecution thought the text needed 'improvement'.) On p. 21 he is more specific: 'This volume sets out in full the arguments of counsel, testimony of witnesses, and remarks of the court, during seven days of trial', and on p. 25 there is a similar statement; but on p. 37 this has become 'an almost complete record of the trial'. No doubt we have been given what is substantially a verbatim report, but it is the duty of an editor of documents like these to explain with precision not only the conditions under which the authorities have permitted publication, but also where, and for what reasons, he has made alterations in the text.

Judged by this test, the reports published by the War Crimes

Commission cannot be called satisfactory. Each report is divided into two main parts—an 'outline of the proceedings' and 'notes on the case'. The first contains the indictment, a summary of the evidence given for the prosecution and the defence, the judgment of the court, and the sentences imposed. The second contains a short but clear discussion of the legal issues raised. Lord Wright explains (Vol. 10, p. 8) that 'the reports on British trials have been written after a study of the verbatim transcripts of the trials involved', and this is also true of the Canadian, Australian and Polish trials, though no verbatim transcripts were available for the reports of the Norwegian, Dutch and French trials. But even if the report was written after a study of the transcripts, the fact remains that we have not been given all the documents, but only summaries of them —and even where extracts are provided there is no indication of how much is omitted or on what principles excisions have been made. This information should have been given; these documents are not merely reports of sensational trials; they are historical documents of the highest public importance, and the reader is entitled to be assured that nothing relevant has been omitted. In a recent article Professor Butterfield of Cambridge has drawn attention to the dangers and temptations which face editors (and readers) of Foreign Office documents. (Official history: its pitfalls and its criteria, *Studies*, June, 1949, p. 129.) There is no reason why lawyers should not heed his warning: 'It may be necessary that official history should be produced. It is equally necessary that it should be subjected to unremitting scrutiny'. These criticisms are not made with the intention of belittling the formidable task which faced the compilers of these reports: there were over 1,600 trials, and the judgment alone in the OKW Case ran to 300 pages. A huge mass of material has been sifted; and the work appears to have been done carefully and conscientiously. But appearances are not enough.

R. F. V. Heuston.[1]

Revue Critique de Droit International Privé. 38 (1949), No. 1. Editor: J. P. Niboyet.

The first number of the *Revue Critique* of 1949 contains an article by G. H. Delaume concerning the influence of French nationality on the solution of conflict problems in the field of personal status. His thesis is: Just as any Frenchman may bring an action in the French court (see article 14 of the Civil Code), so France is under an obligation to him to have French law applied to his case. The Frenchman derives his right to demand this from his quality as a Frenchman. The author, however, restricts such right to cases

[1] Fellow of Pembroke College, Oxford.

involving questions of status or 'general' capacity. He concedes that this solution 'may appear chauvinistic' and is mistaken in thinking that such appearance vanishes through a comparison with (similar) foreign laws; the similarity merely shows that chauvinism is not restricted to France.

The second article by Dr. Seidel-Hohenveldern, competently describes the development of Austrian private international law from 1939 to 1948.

Among other information presented by the *Revue Critique* there is one (pp. 163–186) which arouses particular interest: that is the draft of a Hungarian bill on private international law. The draft is of great length; it contains 129 articles. It is the work of the Budapest professor Stephen Szaszi and has been adopted by the Governmental Committee for Legal Reform. The draftsman is well known to the readers of the *Revue Critique* from his contribution to the 1924 volume, pp. 676 *et seq.*

Martin Wolff.[1]

Jus Gentium: Nordisk Tidsskrift for Folkeret og International Privatret, 1949. Vol. 1. Fasc. 1. [Copenhagen: Ejnar Munksgaards Forlag. Dan. Kr.25 per annual edition.]

The first number of this new journal, which is edited by the well-known Danish jurist Alf Ross, with the assistance of a committee from Norway, Sweden, Denmark and Iceland, contains articles in English by Alf Ross, 'Denmark's Legal Status during the Occupation', and Edvard Hambro, 'The First Three Years of the International Court of Justice'; in Swedish by Algot Bagge, 'The Legal Position of the Allied Powers in Germany', and Torsten Gihl, 'Swedish Neutrality-Practice during the two World Wars'; in Norwegian by Erik Dons, 'Is the question of Human Rights a Domestic Matter?'; and in Danish by Max Sørensen, 'Some Observations on the Functional Principle in International Organisation'. The article by Bagge, Dons and Sørensen are followed by summaries in English. The number also includes a report in Danish of the very important *Adelaide Star Case, Blue Star Line* v. *A/S Burmeister & Wain and Others*, a note by Alf Ross in Danish on 'The Right to take Hostages', and reports of meetings of the International Law Association, and the Norwegian Maritime Law Union.

Nordisk Tidsskrift for International Ret. Acta Scandinavica juris gentium. (1) 1947–48, Vol. 18, Fasc. 4; (2) 1949, Vol. 19, Fasc. 1–2.

(1) This number contains articles in Swedish by Hugo Tamm, 'Some Reflections on the Question of Domestic Jurisdiction

[1] All Souls College, Oxford.

according to the Charter of the United Nations', and by Erik Castrén on 'International Succession with special relation to its development in the most recent times'; and in Danish by Yuen-Li Liang on 'The United Nations and the Development and Codification of International Law'. It also contains notices of meetings of the International Law Association, the United Nations Commission for International Law, the Thirty-seventh Inter-Parliamentary Conference, the Académie de Droit International, and of the establishment of the Upsala Institute for Comparative Jurisprudence. Among interesting personal notes, reference may be made to a short obituary of the well-known Russian jurist Baron Nolde. There is a long collection of documents and a Chronicle of Foreign Affairs, both in Danish, and a Scandinavian Chronology in English.

(2) This number is in general similar to that noticed above and contains the following articles: By P. O. Humber (in Norwegian), The International Courts Opinion concerning the Admission of New Members to the United Nations; by Erik Brüel (in Danish), commentary on the Atlantic Pact; and by Edvard Hambro (in English), Some Reflections about the Relation Between Municipal Law and International Law in Norway. A very interesting digest by Eric Ramel of International Law Cases decided by the Swedish Supreme Court in the years 1944–1947 contains short accounts of cases on the following topics:

1. *Family Law*: (1) Adoption of foreign subjects; (2) nullity jurisdiction over marriages between foreign subjects; (3) The operation in Sweden of decisions of foreign courts annulling divorces previously granted; (4) proper law governing the paternity and maintenance of illegitimate children.

2. *Criminal Law*: Intelligence work concerning Sweden carried out by a foreigner abroad is not regarded as entailing liability for espionage.

3. *Public International Law* (Immunity of States): (1) Operation in Sweden of a foreign decree of nationalisation; content of State immunity: (2) immunity of foreign State.

4. *Law of Procedure*: (1) Operation of foreign decision confiscating property; (2) operation in Sweden of foreign decree of nationalisation; (3) operation in Sweden of foreign bankruptcy proceedings.

F. H. Lawson.[1]

The Elementary Principles of Jurisprudence. By G. W. Keeton, M.A., LL.D. Second Edition. [London: Sir Isaac Pitman & Sons, Ltd. 1949. xxvi and 484 pp. 30s. net.]

This is the second edition of a book first published in 1930, but there have been many changes. Professor Keeton himself tells us

[1] Professor of Comparative Law in the University of Oxford.

that 'this edition is substantially a new book' and it is convenient to regard it in that way. There is no doubt that there is room for a new textbook on jurisprudence, and at first sight this book meets many of the requirements. It is well-bound and competently printed on good white paper, though it is also rather expensive. As Professor Gower has rightly said (12 Mod.Law Rev. 266) it is impossible to exaggerate the importance to students of an attractively produced book. Professor Keeton's style is easy and fluent: his views will not shock the most orthodox teacher: he writes in the established English tradition. This means that there are a few brief but kindly references to the Americans, the Frenchmen, and the Germans, but that the bulk of the book is taken up with a description of the main conceptions of English private law—though there is a fairly long chapter on international law. The reader is not bedevilled by footnotes half a page long referring to unreadable articles in obscure American periodicals, and there are no irritating appendices or excursus. There is perhaps rather more about the historical development of legal theory than is customary in books of this kind, and that is admirable. A more debatable feature is the marked interest shown in Chinese law: there is a fair amount of information about Chinese family law: another reviewer (no doubt more competent on this matter than the present one) has said that this is 'refreshing'. There is a good general index, and tables of the cases and statutes cited. There is also a 'table of authors'. But it is not a critical bibliography, and there is no attempt to indicate to the student which books may be more helpful than others. There are some other curious points about this list. Thus, sometimes the date and place of publication are given, sometimes not; on p. 20, there is a passing reference to Eugen Ehrlich and Max Weber: a reference back discloses that Ehrlich wrote *The Fundamental Principles of the Sociology of Law*—the title and date of publication given are both wrong—but under 'W' all we are told is 'Weber, Max—p. 20'.

English writers on jurisprudence do not fit comfortably into any of Dean Pound's formidable classifications, and Professor Keeton is no exception. The sturdy practical sense of the common law is apt to result in a rather incoherent philosophy. The prevailing tone of this book is one of traditional academic liberalism, though the welfare state and the theories of Professors Laski and Friedmann are taken into account. It is true that in places Mr. Richard O'Sullivan and Count Michael de la Bedoyere are mentioned with approval: but it is all rather half-hearted. (The Recorder of Derby duly appears in the 'table of authors', but the editor of *The Catholic Herald* is less fortunate). However, few students will be worried by the absence of a coherent philosophy if they are able to find an account, lucid and precise, yet reasonably detailed, of what other people have thought. Here Professor Keeton has a most formidable competitor. Professor Paton has set a very severe

standard : for balance, clarity, accuracy and modesty, his *Textbook* is quite outstanding. It is doubtful if Professor Keeton has been as successful. In several places he handles familiar and important material in a most disquieting way. Thus, on p. 43 this passage occurs : ' Austin's definition of sovereignty is as follows : " If a determinate human superior, not in the habit of obedience to a like superior, receives habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent " '.

But this is not Austin's definition : it misquotes him on a crucial point. Austin wrote *receive*, not *receives* : he used the subjunctive mood, not the indicative, because he wished to emphasise that it was a definition, not a description. It is a definition which has a close connection with the facts of a Western political society, but it is still a definition, a minimum working hypothesis, and it would be none the worse as such if obedience were never rendered in fact. (There is a more minor slip : ' the habit ' for ' a habit '). A footnote refers to p. 97 of Jethro Brown's book, where the famous definition is set out correctly, but how many students would follow this up? On p. 47 it is said that ' the Act of Union with Ireland provided that the Irish Church should never be disestablished, but an Act providing for such a disestablishment was enforced '. This misses the important point that the Irish Church Act, 1869, was never enforced by the courts; the precedent is, as Sir Ivor Jennings has pointed out (*The Law and the Constitution*, 3rd ed., p. 146) a parliamentary, not a legal, one. On pp. 138–9 the power-liability relationship in Hohfeld's analysis is discussed. Professor Keeton gives an example : ' A offers to sell Whiteacre to B by post '. He then explains that B has a power to accept the offer within a reasonable time, and until he does so ' A was subject to a liability to sell '. The man who reads this after a study of *Routledge* v. *Grant* and similar cases may think that Hohfeld knew no law. The true analysis, of course, is that A has a liability that B will create contractual relations by accepting the offer. (Incidentally, there is a bad misprint on p. 139—' ability ' for ' liability '.) On p. 256 *The Zamora* is mentioned. That case decided that the Crown could not legislate by Order in Council without the assent of Parliament so as to alter the rules of international law administered in the prize court. But Professor Keeton says that ' it was held by the Privy Council that even a prize court must apply, not only statutes, but Orders in Council with statutory force, in priority to international law '. On p. 296 the effect of *Yaffe's Case* is said to be that ' a majority of the Court of Appeal thought that, notwithstanding the clause, the courts could inquire whether the procedure prescribed by the Act had been complied with, but the House of Lords adopted a different view, although they were prepared to hold the Minister's order invalid because the scheme itself conflicted with the Act '.

It is one of the most important points about *Yaffe's Case* that the House of Lords did not adopt a different view from the Court of Appeal on the question whether the courts could consider if the statutory procedure had been complied with—nor were they prepared to hold the Minister's order invalid; they held that his order confirming the scheme as amended was valid.

On other matters the book also appears to be unsatisfactory. A certain lack of proportion is observable. Is it reasonable to allot one and a half pages to quasi-contract and ten to the corporation sole? Especially when of those ten pages three are devoted to an analysis of *Rennell* v. *Bishop of Lincoln*, of which we are told (p. 156) that 'Although one might . . . have expected the foundations of the nature of a corporation sole to be examined, nothing of the kind occurred'. Some important questions are not discussed at all, *e.g.*, legal fictions and Dean Pound's theory of interests. Others are discussed without giving adequate references to the principal authorities. Thus, the complex question of precedents in the Court of Appeal is disposed of by stating the principles enunciated in *Young* v. *Bristol Aeroplane Co.* and adding 'Followed in *Roberts* v. *Dorothea Slate Quarries*', Hohfeld is dealt with, but there is no reference to Corbin in 29 *Yale Law Journal* or Radin in 51 *Harvard Law Review*; there is a long discussion of the American administrative procedure Act, but no reference to Schwarz in 63 L.Q.R. 43; *Brend* v. *Wood* does not appear in the section on mens rea, or *Baindail* v. *Baindail* in the section on status and capacity. Minor points are the use of the Twiss and not the Woodbine edition of Bracton, and the absence of any reference to J. W. Jones's *Historical Introduction to The Theory of Law*—surely one of the most important English contributions to jurisprudence of this century.

R. F. V. Heuston.

Freedom Under the Law. By the Rt. Hon. Sir Alfred Denning. [London: Stevens & Sons, Ltd. 1949. 8s.]

Freedom Under the Law is the title given by Lord Justice Denning to the first series of Hamlyn Lectures which he delivered in London in 1949 and which are collected in this volume. The subject-matter has little connection with international law and a brief notice must suffice. Lord Justice Denning gives a general account of the method by which personal freedom is secured under English legal institutions. He then proceeds to discuss questions of freedom of mind and conscience, and deals particularly with freedom of political and religious beliefs under English law. In the third and fourth lectures Lord Justice Denning discusses the changes in the function of the modern English State, and is particularly concerned with the

problems arising out of the vast expansion of executive powers and the development of a fabric of administrative law and tribunals.

It is very interesting to note the reflections of a contemporary English judge on the developments of State functions and administrative law. Unlike Dicey he presents an informed and sympathetic picture of French administrative law. He is sympathetic to the existence and organisation of administrative tribunals subject to certain safeguards—publicity of decisions, the right to legal representation, and especially the right of appeal to a superior court. Similarly, Lord Justice Denning does not view the growth of executive functions with hostility: his thesis is that the executive must use its powers honestly and reasonably for the purposes authorised by Parliament, and that it is a prime function of the courts to ensure this.

If one may respectfully say so, the lectures bear the imprint of a wise and liberal spirit. Occasionally there is an exaggerated echo of an old Whig interpretation of history (see pp. 6–7 where the author paints a picture of Stuart tyranny and forgets to mention an episode two centuries later when the House of Commons did the same thing). But in general Lord Justice Denning has provided a very able and extremely well written statement of some of the fundamental characteristics of English political and legal institutions and has raised and suggested answers to certain of the great contemporary problems in English public law.

The South African Constitution. By Henry John May. Second edition. [Capetown and Johannesburg: Juta & Co., Ltd. 1949. 447 pp. £2 8s.]

The first edition of this work entitled 'The Law and Custom of the South African Constitution' was the joint work of Professor W. P. M. Kennedy and Mr. H. J. Schlosberg. The second edition by Mr. H. J. May contains many alterations. Part of the text has been considerably expanded: such matters as the government and representation of the non-European population, the power of amending the Constitution, especially the entrenched provisions, the problems which arise from the delegation of powers, have all called for extended treatment. This has been at the expense of the historical treatment of the Constitution and of a table of cases and statutes. The loss of the historical matter in a study of the South African Constitution is a pity, but is perhaps excusable. The deletion of a table of cases and statutes is an entirely different matter. It may be that a non-lawyer will not be much troubled by such an omission, but to a lawyer it is a source of irritation and criticism. The present reviewer wished to check a comment on a case, and had to spend unnecessary time thumbing through the index to find his

reference. It is to be hoped that this omission will be rectified in subsequent editions.

The book is, in general, comprehensive in its treatment of the subject-matters which fall within its scope. Part I is devoted to the general principles of the Constitution, and successive parts deal with the executive government, parliament, the provinces, justice, the government of non-Europeans and to external affairs. There are appendices which give the texts or refer to the texts of important United Kingdom and South African Acts.

Mr. May devotes considerable space to a discussion of the 'entrenched provisions'. Section 152 of the South Africa Act provides that certain provisions of the Act shall not be amended except in accordance with a parliamentary procedure set out in section 152. It has been, and is, a pressing question in the Union whether, since the Statute of Westminster, 1931, these provisions are in fact 'entrenched', or whether the effect of the Statute of Westminster has been to confer power on the South African legislature to repeal the entrenched provisions by means of a simple Act of Parliament. The matter is of particular importance in relation to native rights. Mr. May, while believing that there is a moral obligation to respect the provisions of section 152, nevertheless concludes that the *legal* obligation is 'as dead as the proverbial dodo' (p. 33). It may be that this view is correct. It certainly accords with the opinions of the majority of constitutional authorities. It is supported by Wheare (*The Statute of Westminster and Dominion Status*, 3rd ed., 1947, pp. 240 *et seq.*), though this authority appears to have misinterpreted *Ndlwana* v. *Hofmeyr* [1937] A.D. 229 as a case bearing *directly* on the entrenched provisions section. That case was not in fact an entrenched provisions decision at all, and section 152 was discussed only in the Cape Provincial Division judgments, in which the question of the entrenched provisions was expressly left open. This, however, does not necessarily affect the validity of Mr. May's point. That there is an argument which runs in the contrary direction is, however, ignored by the author. It is perhaps suggested in subtle language in the judgment of Dixon J. in the High Court of Australia in *Att.-Gen. for New South Wales* v. *Trethowan* (1931) 44 Commonwealth L.R. at p. 425. There is also some hint of it in Evatt, *The King and His Dominion Governors* (1936) pp. 307 *et seq.* It is somewhat surprising that this question was not more elaborately discussed by Mr. May. It may be that the fact that the book is designed not only for lawyers, but for a much wider general public, has deterred him from embarking upon refined and complex legal analysis. It detracts, however, from the value of the work as a standard legal authority on the South African Constitution.

There are one or two errors which should be corrected. The statement (p. 388) that New Zealand has not adopted the Statute of Westminster was, even at the date of publication, incorrect. The

Privy Council decision in *British Coal Corporation* v. *The King* [1935] A.C. 500 is cited (p. 381, footnote 7) as authority for the proposition that the Canadian Parliament had power to abolish appeals to the Privy Council. That case dealt with *criminal* appeals. The further question of *civil* appeals was dealt with by the Privy Council in *Att.-Gen. for Ontario* v. *Att.-Gen. for Canada* [1947] A.C. 127.

Mr. May's book contains a good deal of useful information on the constitutional structure of South Africa. However, there is a feeling that the book falls between stools. It is neither wholly a lawyer's book nor entirely a non-technical exposition. It is a rather thankless task to prepare a study of a constitution, as legislative changes and judicial interpretation very often outdate such a study shortly after it has left the press. It is certainly not suggested that this is the case with Mr. May's book, but the book leaves the impression that it is not quite as valuable and careful a legal study as might have been desired.

LIST OF DOCUMENTS

I. Agreements and Other Documents [1]

Report by the Governor-General on the Administration Finances and Conditions of the Sudan in 1947. [Sudan 1949/1, Cmd. 7835.]

Agreement for the establishment of the Indo-Pacific Fisheries Council. [Treaty Series 1949/73, February 26, 1948, Cmd. 7845.]

Report and Recommendations of the Inter-Governmental Group on the Safeguarding of Foreign Interests in Germany. [Germany 1949/5, October 25–November 10, 1948, Cmd. 7850.]

Exchange of Notes between H.M.G. in the U.K. of Great Britain and Northern Ireland and the Danish Government prolonging the Agreement for the participation of a Danish Contingent in the Occupation of Germany of April 22, 1947. [Treaty Series 1949/55, December 10, 1948, Cmd. 7785.]

International Wheat Agreement. [Misc. 1949/6, March 23, 1949, Cmd. 7680.]

Report on the Proceedings of the Second Part of the Third Session of the General Assembly of the United Nations held in New York. [United Nations 1949/4, April 5–May 18, 1949, Cmd. 7752.]

Amendments to the Schedule of the International Whaling Convention signed at Washington on December 2, 1946. [Treaty Series 1949/75, May 30–June 7, 1949, Cmd. 7853.]

Exchange of Notes between H.M.G. in the U.K. and the Royal Netherlands Government regarding settlement for U.K. purchases from the Netherlands under long-term contracts. [Treaty Series 1949/72, July 7, 1949, Cmd. 7843.]

Agreement between the Government of the U.K. of Great Britain and Northern Ireland and the United States, United Kingdom and French Military Governors of Germany. [Treaty Series 1949/71, August 5, 1949, Cmd. 7824.]

Statement on behalf of the Military Governors of France the U.K. and the United States of America regarding the Tariff of the Western Zones of Germany and Memorandum of Understanding relative to the Application of the Western Sectors of Berlin of the Agreement on Most-Favoured-Nation Treatment for Areas of Western Germany under Military Occupation. [August 13, 1949, Cmd. 7790.]

[1] Can be purchased directly from His Majesty's Stationery Office.

Economic Co-operation Fifth Report on Operations under the Agreement between the Governments of the U.K. and the U.S.A. Covering the third calendar quarter of 1949. [Cmd. 7844.]

General Agreement on Privileges and Immunities of the Council of Europe. [Misc. 1949/17, September 2, 1949, Cmd. 7780.]

Exchange of Notes between H.M.G. in the U.K. and Government of San Marino for the Mutual Abolition of Visas. [Treaty Series 1949/70, September 12, 1949, Cmd. 7825.]

Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Belgian Government prolonging until October 31, 1949 the Monetary Agreement of November 14, 1947. [Treaty Series 1949/69, June 30–September 30, 1949, Cmd. 7823.]

Report on some Methods used to assist Local Government and the Civil Service in the British Zone of Germany. [Germany 1949/3, October 18, 1949, Cmd. 7804.]

Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Royal Netherlands Government further amending the Anglo–Netherlands Monetary Agreement of September 7, 1945. [Treaty Series 1949/76, October 27, 1949, Cmd. 7854.]

Report on the Proceedings of the Second Session of the Committee of Ministers and of the Second Meeting of the Standing Committee of the Council of Europe. [Misc. 1949/16, November 3–9, 1949, Cmd. 7838.]

Germany. The Three Power Meeting in Paris on November 9 and 10, 1949, and subsequent events. [Germany 1949/4, Cmd. 7849.]

Exchange of Notes between His Majesty's Government in the United Kingdom and the Danish, Icelandic, Italian, Luxembourg, Norwegian, Swedish and Swiss Governments adding Kenya to the List of Territories covered by the Visa Abolition Agreements. [Treaty Series 1949/74, November 11–18, 1949, Cmd. 7847.]

Exchange of Notes between the Government of the United Kingdom and the Government of the United States of America for the settlement of certain outstanding matters relating to the Establishment of the United States Air Force Base in Trinidad. [Treaty Series 1950/3, September 19, 1949, Cmd. 7864.]

Agreement between His Majesty in respect of the United Kingdom of Great Britain and Northern Ireland, His Royal Highness the Prince Regent of Belgium, the President of the French Republic, President of the French Union, Her Royal Highness the Grand Duchess of Luxembourg and Her Majesty the Queen of the Netherlands relative to the Status of Members of the Armed

Forces of the Brussels Treaty Powers. [Misc. 1950/1, December 21, 1949, Cmd. 7868.]

Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federal People's Republic of Yugoslavia regarding the Terms and Conditions of Payment of the Balance of Compensation for British Property, Rights and Interests affected by Yugoslav Measures of Nationalisation, Expropriation, Dispossession and Liquidation. [Treaty Series 1950/5, December 20, 1949, Cmd. 7875.]

Trade Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federal People's Republic of Yugoslavia. [Treaty Series 1950/6, December 26, 1949, Cmd. 7880.]

II. Statutory Instruments [2]

The Diplomatic Privileges (Brussels Treaty Permanent Commission) (Amendment No. 2) Order in Council, 1949. [No. 2190, November 25.]

The Tanganyika (Legislative Council) Amendment Order in Council, 1949. [No. 2191, November 25.]

The Gold Coast Colony and Ashanti (Legislative Council) (Amendment No. 2) Order in Council, 1949. [No. 2333, December 15.]

The India (Consequential Provisions) Order, 1949. [No. 2411, December 21.]

The Citizenship Law (Southern Rhodesia) Order, 1950. [No. 61, January 12.]

III. Resolutions of the Fourth Session of the General Assembly [3]

288.	Threats to the political independence and territorial integrity of Greece . . .	Nov. 18, 1949
289.	Question of the Disposal of the former Italian colonies	Nov. 21, 1949
290.	Essentials of peace	Dec. 1, 1949
291.	Promotion of the stability of international relations in the Far East	Dec. 8, 1949
293.	The problem of the independence of Korea	Oct. 21, 1949
294.	Observance in Bulgaria, Hungary and Roumania of human rights and fundamental freedoms	Oct. 22, 1949

[2] Can be purchased directly from His Majesty's Stationery Office.

[3] The United Nations Information Centre, Russell Square, London, W.C.1, has kindly stated that it will be pleased to answer any inquiries concerning United Nations Documents that may be made by readers.

295.	Re-establishment of the Interim Committee of the General Assembly	Nov. 21, 1949
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300.	Regulation and reduction of conventional armaments and armed forces	Dec. 5, 1949
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303.	Palestine: question of an international regime for the Jerusalem area and the protection of the Holy Places	Dec. 9, 1949
313.	Draft Convention on Freedom of Information	Oct. 20, 1949
315.	Discriminations practised by certain States against immigrating labour and, in particular, against labour recruited from the ranks of refugees	Nov. 17, 1949
317.	Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others	Dec. 2, 1949
319.	Refugees and Stateless persons	Dec. 3, 1949
321.	International Trusteeship System: petitions and visiting missions	Nov. 15, 1949
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326.	Administrative unions affecting Trust Territories	Nov. 15, 1949
331.	International collaboration in regard to economic, social and educational conditions in Non-Self-Governing Territories	Dec. 2, 1949
332.	Establishment of a Special Committee on Information transmitted under Article 73 of the Charter	Dec. 2, 1949
333.	Work of the Special Committee on Information transmitted under Article 73 of the Charter	Dec. 2, 1949
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338.	Question of South West Africa: request for an advisory opinion of the International Court of Justice	Dec. 6, 1949
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351.	Establishment of a United Nations Administrative Tribunal	
361.	Approval of a supplementary agreement with the Universal Postal Union concerning the use of the United Nations laissez-passer	Oct. 22, 1949

362.	Methods and procedures of the General Assembly	Oct. 22, 1949
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The Editor and the members of the Editorial Committee do not hold themselves in any way responsible for the views expressed by contributors.

Editorial communications should be addressed to the Editor, Zelman Cowen, Esq., Oriel College, Oxford. Stamped addressed envelopes should accompany MSS. for acknowledgment and return. Books for review should also be sent to the Editor.